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Confronting Evil: Victims' Rights in an Age of Terror

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ARTICLES

Confronting Evil: Victims' Rights in an Age of Terror

WAYNE A. LOGAN*

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INTRODUCTION

Today, it is widely agreed that the tragic events of September 11, 2001 changed everything. With almost three thousand innocents killed, and almost as many injured, the tragedy marked an unprecedented and highly lethal development, presumably demanding an equally novel legal response. The U.S. government, however, as it had in the wake of the bombings of the Murrah Federal Building in Oklahoma City (1995), and the U.S. Embassy in Kenya (1998), pursued a decidedly orthodox path, prosecuting Zacarias Moussaoui, the sole defendant apprehended in connection with September 11, in federal criminal court for capital murder.¹

With this strategic choice, the United States imported the trappings of its criminal justice system, a system which has, over the past twenty-five years, increasingly incorporated input from victims on guilt and punishment decisions.² The upshot has been a melding of the era of victims' rights and the age of terror,³ obliging a legal system conceived and operated under conventional circumstances to respond to unique depravity, human suffering, and material destruction.

This Article examines a particular aspect of this convergence: the use in mass killing prosecutions of victim impact evidence (VIE)—information on decedents' personal traits and the ways in which their deaths have adversely affected

1. The United States has also advanced military commissions as a potential accountability mechanism. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). To date, however, no such proceedings have taken place, despite authorizing legislation from Congress and recently adopted governing rules. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a), 120 Stat. 2600 (to be codified at 10 U.S.C. §§ 948b, 949a); DEP'T OF DEF., *MANUAL FOR MILITARY COMMISSIONS* (2007) (setting forth procedural and evidentiary rules for military commissions as well as substantive elements of crimes that may be punishable by commissions).

2. See Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 21-23 (1999) (describing the emergence of the victim's movement in the 1970s).

3. See George W. Bush, President of the U.S., President Calls for Crime Victims' Rights Amendment, Speech at the United States Department of Justice (Apr. 16, 2002) ("In our war against terror, I constantly remind our fellow citizens . . . [that] [w]e seek justice for victims. We seek justice for their families.").

those left behind. Available for use since the Supreme Court's landmark 1991 decision in *Payne v. Tennessee*,⁴ VIE is said to serve two chief purposes: first, it allows death decisions to be based on the "specific harm caused by a defendant," affording the sentencing authority greater understanding into the defendant's moral culpability and blameworthiness;⁵ second, it highlights that murder victims are not "'faceless stranger[s],'"⁶ permitting the government to muster the "full moral force of its evidence" in capital prosecutions.⁷

Although VIE has come to figure centrally in U.S. capital trials, it continues to inspire debate and controversy. To date, however, commentators have focused exclusively on trials involving single or perhaps double-homicides (as in *Payne*), not mass killings, with their catastrophically greater harms and distinct legal, social, and political circumstances. This Article marks the first effort to examine the role of VIE in such prosecutions, highlighting the many unique difficulties its use presents. Given the likely continued terrorist targeting of Americans, the insights provided here have critical importance for U.S. domestic policy. Yet because such calamities will also continue to beset the international community, which itself is showing increased sensitivity to victims' rights, the discussion here has global significance as well.

The Article contains five parts. Part I provides an overview of the jurisprudential history and use of VIE in the United States, from its initial invalidation on Eighth Amendment grounds (on two occasions) by the Supreme Court to its resurrection in *Payne* and subsequent widespread adoption by state and federal courts. Part II examines the mass killing trials in which VIE has been admitted: the capital prosecutions of Timothy McVeigh and Terry Nichols for the Oklahoma City bombing (168 deaths); Mohamed Rashed Daoud Al-'Owhali for the bombing of the U.S. Embassy in Nairobi, Kenya (213 deaths); and Zacarias Moussaoui for the events of September 11 (just under 3,000 deaths). In each proceeding, the U.S. government employed massive amounts of VIE, provided by dozens of witnesses of diverse backgrounds who offered highly emotional and compelling testimony on the personal traits of decedents and the myriad ways in which the tragedies had adversely affected their lives.

Part III compares the use of VIE in mass killing prosecutions with that in more conventional capital trials. While mass killing can be thought *sui generis*, due to the scope of death and destruction they cause and the political motivations often inspiring defendants, government use of VIE in their prosecution casts in new light many traditional concerns raised over VIE, in some respects mitigating such concerns and in others exacerbating them. Part III concludes by considering the fundamental question of whether VIE has a proper place in mass killing trials at all. Indeed, in such trials, *Payne*'s core retributive tenet that

4. 501 U.S. 808 (1991).

5. *Id.* at 825, 827.

6. *Id.* at 825 (quoting *South Carolina v. Gathers*, 490 U.S. 805, 821 (1989) (O'Connor, J., dissenting)).

7. *Id.* at 825.

gravity of harm is central to assessing culpability can be said simply to prove too much. How can it be that anything short of death is justified when hundreds or thousands of innocents have perished at the hands of the defendant? Furthermore, in the face of such devastation, it strains credulity to believe that VIE is necessary to ensure that the government is not deprived of the "full moral force of its evidence."⁸

Surprisingly, however, despite what might be thought of as the preordained outcome of the U.S. mass killing trials surveyed—the imposition of a death sentence—the government's record of success with VIE is less than impressive. Only Timothy McVeigh was sentenced to death. In light of this, the discussion in Part IV centers on the broader instrumental benefits of VIE in mass killing prosecutions, in particular, its critically important didactic function. As recognized since the historic Nuremberg trials of Nazi defendants in the aftermath of World War II, courtrooms afford a highly valuable forum to generate a public historical record in the wake of mass killings.

VIE expands this opportunity in unique ways, to the advantage of government and victims alike.⁹ This benefit was readily evident in the *Moussaoui* trial, where the U.S. government and New York City (embodied in VIE witness Rudolph Giuliani, ex-Mayor of New York) were permitted to cast themselves as sufferers of terrorist savagery, affording a counterweight to persistent assertions that their lack of readiness exacerbated (or even allowed) the events of 9/11.¹⁰ Victims, meanwhile, were similarly able to re-assert and instantiate their status as worthy innocents, permitting their rehabilitation from recurrent public portrayals as greedy and ungrateful beneficiaries of the 9/11 Compensation Fund.¹¹

After surveying the role of VIE in U.S. mass killing prosecutions, the Article turns to the question of whether VIE should play a role in international criminal prosecutions of mass killers. To set the parameters of the discussion, Part V examines two of history's most noted trials, the Nuremberg Tribunal and Israel's prosecution of Adolf Eichmann. While each sought to redress Nazi atrocities and render a historical record, the trials went about doing so in very different ways. Whereas in Nuremberg prosecutors relied almost entirely on documents and exalted legalism, in *Eichmann*, like the U.S. mass killing trials surveyed, highly emotional testimony from victims served as the government's evidentiary mainstay. The respective approaches have been the subject of considerable critical commentary over the years—most notably from Hannah

8. *Id.*

9. "Victim," unless otherwise indicated, is used broadly here to include direct victims (for example, decedents and those who were injured yet survived) and indirect victims (for example, family members) who themselves were not killed or injured yet suffer emotional and other kinds of harm as a result of a killing.

10. See *infra* notes 246–59 and accompanying text.

11. See *infra* notes 260–74 and accompanying text.

Arendt¹²—casting in bold relief the essential political character of the criminal prosecution process.¹³

Viewed in these terms, the propriety of VIE ultimately presents the international legal community with a normative political question: whether the pathos of victims should be permitted to infuse legal processes and decision making. While the U.S. response to this question has been in the affirmative, for reasons discussed, the international community would be well advised to exercise restraint if it wishes to secure and maintain the perceived legitimacy of its trial and punishment of those involved in the mass killing of innocents.

I. ORIGINS AND USE OF VIE IN U.S. COURTS

A. *BOOTH V. MARYLAND* AND *SOUTH CAROLINA V. GATHERS*

In *Booth v. Maryland*,¹⁴ the Supreme Court addressed whether a Maryland statute permitting the government to introduce information relating to the personal characteristics of a murder victim and the emotional impact of the killing on the victim's family violated the Eighth Amendment.¹⁵ Writing for the majority, Justice Powell referred to the information as "irrelevant" and flatly rejected the State's assertion that it was needed to allow the sentencing authority to assess the "gravity" of the offense.¹⁶ According to Justice Powell, the information improperly served to refocus the sentencing decision from the defendant and his criminal act to "the character and reputation of the victim and the effect on his family," despite the fact that the defendant was perhaps wholly unaware of the personal qualities of the victim.¹⁷ In so doing, Justice Powell asserted, the State created "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner" in violation of the Eighth Amendment.¹⁸

Two years later, in *South Carolina v. Gathers*,¹⁹ the Court addressed yet another Eighth Amendment challenge to VIE, this time involving an emotional closing argument by a prosecutor that praised, *inter alia*, the religiosity and civic-mindedness of the decedent, a self-styled "Reverend Minister."²⁰ Al-

12. See, e.g., HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 19 (Penguin Books 1994) (1963).

13. As Judith Shklar observed, the legal process is inseparable from politics; the question is not whether the law is political, but instead whether the political values that it serves warrant endorsement. JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 144 (1964); see also Vivian Grosswald Curran, *Politicizing the Crime Against Humanity: The French Example*, 78 NOTRE DAME L. REV. 677, 678 (2003) (noting that "although law and politics are not identical, they are inseparable. Their inseparability has proven to be one of a very few reliable universals of our world").

14. 482 U.S. 496 (1987).

15. *Id.* at 501–02.

16. *Id.* at 503–05.

17. *Id.* at 504–05.

18. *Id.* at 503.

19. 490 U.S. 805 (1989).

20. *Id.* at 808–10.

though not entailing testimony from surviving family members, as in *Booth*, the Court considered the statements "indistinguishable" in their arbitrary nature and potential effect.²¹ Permitting the jury to consider the victim's traits, the five-member *Gathers* majority held, "'could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill.'"²²

B. *PAYNE V. TENNESSEE*

Despite the unequivocal holding of *Booth*, the State of Tennessee employed VIE in its 1988 capital trial of Pervis Payne for the stabbing deaths of Charisse Christopher and her two-year-old daughter Lacie Jo. After Payne was convicted of both murder counts, the State presented the testimony of Ms. Christopher's mother, who testified during the sentencing phase how her grandson Nicholas, who himself had been non-fatally stabbed by Payne and witnessed the gruesome events, had been affected by the murders of his mother and sister:

He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie. And I tell him yes. He says I'm worried about my Lacie.²³

The prosecutor elaborated on Nicholas' physical and emotional harms during his closing argument, and offered during his rebuttal that:

His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby.

[Petitioner's attorney] . . . doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that . . . that child will carry forever.²⁴

The jury sentenced Payne to death on both murder counts, the Supreme Court of Tennessee affirmed,²⁵ and the U.S. Supreme Court granted certiorari to reconsider its prior rejection of VIE.²⁶ Over the vigorous dissents of Justices Stevens and Marshall, with Justice Marshall describing the majority's opinion

21. *Id.* at 811.

22. *Id.* (quoting *Booth*, 482 U.S. at 505).

23. *Payne v. Tennessee*, 501 U.S. 808, 814-15 (1991).

24. *Id.* at 816.

25. *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990) (holding that, assuming prosecutor's argument violated Eighth Amendment, admission of victim impact evidence was harmless error).

26. *Payne*, 501 U.S. at 817.

as the triumph of “[p]ower, not reason,”²⁷ a six-member majority of the Court reversed *Booth* and *Gathers*, in part,²⁸ and affirmed Payne’s death sentence.²⁹

Writing for the majority, Chief Justice Rehnquist first disputed the premise of *Booth* and *Gathers* that “evidence relating to a particular victim or to the harm that a capital defendant causes a victim’s family” is immaterial to a capital decision.³⁰ Rather, harm traditionally has played a role in assessing culpability in punishment decisions; although this “particular kind of evidence—designed to portray for the sentencing authority the actual harm caused by a particular crime—is of recent origin, this fact hardly renders it unconstitutional.”³¹ According to the Chief Justice, “[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.”³²

A second, more practical reason for admitting VIE was to “keep the balance true” in the capital decision-making process.³³ Because the Court’s prior precedent granted capital defendants the virtual unfettered right to proffer mitigating evidence, in the name of showing their “uniqueness” and lessened personal culpability,³⁴ fairness dictated that evidence relating to the uniqueness of the lives taken by defendants be considered as well.³⁵ Citing Justice White’s dissent in *Booth*, Chief Justice Rehnquist endorsed the potential leveling effect of apprising the sentencing authority of the personal traits of victims and the losses suffered by survivors:

[T]he state has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.³⁶

To the *Payne* majority, *Booth* “unfairly weighted the scales in a capital trial,”³⁷ insofar as precluding VIE “deprives the State of the full moral force of

27. *Id.* at 844 (Marshall, J., dissenting).

28. The majority left intact two prohibitions contained in *Booth*: witness recommendations on the sentence that should be imposed and witness characterizations of the defendant and the crime. *See id.* at 830 n.2.

29. *Id.* at 830.

30. *Id.* at 819.

31. *Id.* at 821.

32. *Id.* at 825.

33. *Id.* at 827 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.)).

34. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 602–03 (1978) (holding that the sentencing authority cannot be precluded from considering “any aspect of the defendant’s character or record”).

35. *Payne*, 501 U.S. at 826 (“[T]here is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant.”).

36. *Id.* at 825 (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (White, J., dissenting)).

37. *Id.* at 809.

its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.”³⁸ The government, in short, must be permitted to offer “a quick glimpse of the life which a defendant ‘chose to extinguish.’”³⁹ For identical reasons, the majority reversed *Gathers*, thereby permitting jury arguments by the prosecution relating to VIE.⁴⁰

C. POST-PAYNE

Notwithstanding *Payne*’s ostensibly neutral position on its use,⁴¹ VIE has come to play a central role in the sentencing phase of U.S. capital trials.⁴² Today, the federal government, U.S. military, and thirty-five of the thirty-eight capital states authorize use of VIE in death penalty sentencing proceedings.⁴³ This rapid embrace of VIE has come as no surprise, given the perceived strategic value to prosecutors of augmenting their arsenal of aggravating circumstances with such an emotionally compelling form of evidence. The popularity of VIE can also be explained by the humanistic appeal of affording a “voice” to those silenced by their killers,⁴⁴ and the prospect that the healing process for survivors will be advanced by providing an opportunity to testify publicly about their loss,⁴⁵ both goals of the politically powerful victims’ rights movement.⁴⁶

Consistent with *Payne*’s sole admonition that VIE not be so “unduly prejudicial that it renders the trial fundamentally unfair” for purposes of Fourteenth Amendment due process analysis,⁴⁷ VIE has enjoyed virtually unconstrained

38. *Id.* at 825.

39. *Id.* at 822 (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

40. *See id.* at 827.

41. *Id.* (“We thus hold that if the State chooses to permit the admission of victim impact evidence . . . the Eighth Amendment erects no *per se* bar.”).

42. *See United States v. Sampson*, 332 F. Supp. 2d 325, 338 (D. Mass. 2004) (noting that VIE has become a “regular, legitimate feature” of capital trials).

43. Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1869 (2005).

44. *See Payne*, 501 U.S. at 832 (O’Connor, J., concurring) (observing that “[m]urder is the ultimate act of depersonalization. It transforms a living person with hopes, dreams and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.” (citation omitted)).

45. *See Linda G. Mills, The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 483 (2006).

46. *See Payne*, 501 U.S. at 834 (Scalia, J., concurring) (asserting that *Booth*’s characterization of VIE as “irrelevant” was in direct “conflict[] with a public sense of justice keen enough that it has found voice in a nationwide ‘victims’ rights’ movement”); *see also* DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 121 (2001) (“[V]ictims have become a favoured constituency and the aim of serving victims has become part of the redefined mission of all criminal justice agencies.”); Lynn N. Henderson, *The Wrongs of Victims’ Rights*, 37 STAN. L. REV. 937, 952 (1985) (posing the rhetorical question: “Who could be anti-victim?”). For discussion of the participatory goals of the victims’ rights movement, *see Tobolowsky, supra* note 2, at 21, 30 (noting that the movement “emphasized making the crime victim an integral part of the criminal justice process once again,” through such procedures as allowing the victim to testify at sentencing hearings about the personal effects of crime).

47. *Payne*, 501 U.S. at 825.

use.⁴⁸ Much as in the states, in the federal system—where mass killing prosecutions have thus far taken place—VIE is generously admitted.⁴⁹ Although not expressly designated a statutory aggravating factor,⁵⁰ 18 U.S.C. § 3593—the section of the Federal Death Penalty Act (FDPA) that governs capital sentencing procedures—identifies VIE as a factor upon which the government can rely.⁵¹ In the event that the sentencing authority unanimously finds that the government has established beyond a reasonable doubt the existence of at least one statutory aggravating factor, VIE can be considered in the capital decision.⁵²

Congress, however, refrained from specifying who is eligible to testify, the number of witnesses allowed, and the types of harm that can be considered. The FDPA merely provides that the government can adduce evidence that “may include factors concerning the effect of the offense on the victim and the victim’s family”⁵³ and that such evidence “may include . . . a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim’s family, and any other relevant information.”⁵⁴ The federal Crime Victims’ Rights Act, while ensuring a right of crime victims to provide input at sentencing,⁵⁵ adds only that a victim is “a person directly and proximately harmed” by a criminal offense.⁵⁶

Even though by its terms the FDPA alludes only to “the victim and the victim’s family,”⁵⁷ federal courts have permitted testimony from a broad array of others, including teachers, neighbors, school classmates, friends, and co-workers.⁵⁸ In *United States v. Allen*,⁵⁹ for instance, a capital trial involving the death of a security guard during a failed armed bank robbery, the government offered eleven VIE witnesses, including a former co-worker, two bank employ-

48. For discussion of the expansive forms of VIE admitted in state capital trials, see Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Testimony in Capital Trials*, 41 ARIZ. L. REV. 143, 151–53 (1999).

49. See *United States v. Gilbert*, 120 F. Supp. 2d 147, 149 (D. Mass. 2000) (“Congress has not provided specific guidelines for the admissibility of [VIE]. Rather, it has entrusted trial judges both with substantial responsibility and with broad discretion to act as guardians of the sentencing process.”).

50. See 18 U.S.C.A. § 3592(c) (West 2000 & Supp. 2007) (identifying aggravating factors for capital crimes).

51. See 18 U.S.C. § 3593(a) (2000); *United States v. Davis*, 912 F. Supp. 938, 947 (E.D. La. 1996) (identifying VIE as a non-statutory aggravator in federal capital proceedings).

52. See 18 U.S.C. § 3593(a), (d), (e) (2000).

53. *Id.* § 3593(a).

54. *Id.*

55. *Id.* § 3771(a)(4) (Supp. IV 2006).

56. *Id.* § 3771(e) (Supp. IV 2006).

57. *Id.* § 3593(a). For fuller discussion of the gamut of individuals permitted to testify, see Wayne A. Logan, *Victim Impact Evidence in Federal Capital Trials*, 19 FED. SENT’G REP. 5, 7 (2006).

58. See, e.g., *United States v. Nelson*, 347 F.3d 701, 713–14 (8th Cir. 2003) (teacher, neighbor, and classmate); *United States v. Bernard*, 299 F.3d 467, 478 (5th Cir. 2002) (friend and former co-worker); *United States v. Allen*, 247 F.3d 741, 779 (8th Cir. 2001) (co-worker and former co-worker), *vacated on other grounds*, 536 U.S. 953 (2002); *United States v. Paul*, 217 F.3d 989, 995, 1002 (8th Cir. 2000) (co-worker).

59. 247 F.3d 741 (8th Cir. 2001).

ees, and the decedent's ex-wife.⁶⁰ Meanwhile, in *United States v. Barnette*,⁶¹ a prosecution for a double-murder, the government called seven VIE witnesses,⁶² and in *United States v. Sampson*,⁶³ the court decided without elaboration that three to four family members for each decedent could testify in a charged double-murder.⁶⁴

Likewise, the definitional scope of "impact" has been noticeably indefinite, with substantive law again providing only modest help. Federal courts have permitted evidence well beyond the FDPA's express allowance for information on the "injury and loss suffered by the victim and the victim's family,"⁶⁵ again presumably (though not expressly) relying upon its catch-all reference to "and any other relevant information."⁶⁶ In *United States v. Battle*,⁶⁷ for instance, three prison guards were permitted to testify of the impact the killing of a fellow guard had on the atmosphere of a federal prison.⁶⁸ The Eleventh Circuit allowed the testimony because it conveyed that the murder did not "simply[] take a life," but also emboldened other prisoners to harass guards and increased "stresses on prison staff (making them feel less safe)."⁶⁹ More recently, the Ninth Circuit approved of VIE from three witnesses on how the murder of a Navajo grandmother had denied the transmission of tribal heritage, tradition, and practice to her children and grandchildren,⁷⁰ and a federal district court in Kansas approved of VIE on the effect the murder of a local sheriff had on the sheriff's department.⁷¹ Finally, in a capital trial for attempted espionage involving no deaths, the Eastern District of Virginia rejected a vagueness challenge to VIE regarding "[t]hreats to national security,"⁷² noting that such threats "are not obtuse

60. *Id.* at 779.

61. 211 F.3d 803 (4th Cir. 2000).

62. *See id.* at 808, 818.

63. 335 F. Supp. 2d 166 (D. Mass. 2004).

64. *Id.* at 189.

65. 18 U.S.C. § 3595(a) (2000). *Payne* itself variously refers to the harms caused a "victim's family" and the "loss to the victim's family and to society." *Payne v. Tennessee*, 501 U.S. 808, 819, 822 (1991); *see also id.* at 830 (O'Connor, J., concurring) (referring to the "impact on the victim's family and community"); *id.* at 835 (Souter, J., concurring) (referring to "the impact of the crime on the victim's survivors"). More recently, in *United States v. Jones*, 527 U.S. 373 (1999), the Court characterized VIE as addressing the impact on "the victim's family" and "friends." *Id.* at 395, 401.

66. 18 U.S.C. § 3593(a). Again, only a handful of states have specified what can be deemed "impact." *See Logan, supra* note 48, at 162 & n.115.

67. 173 F.3d 1343 (11th Cir. 1999).

68. *Id.* at 1348, 1349.

69. *Id.* at 1348 n.6, 1350. Federal trial courts, in New York at least, appear more ambivalent on the admission of what might be called "institutional" VIE. *Compare United States v. Wilson*, 493 F. Supp. 2d 364, 395–96 (E.D.N.Y. 2006) (allowing VIE on "chilling effect" that killing of two undercover police detectives had on the city's other undercover detectives), *with United States v. Quinones*, No. 00 CR.761(JSR), 2004 WL 1234044, at *3 n.2 (S.D.N.Y. 2004) (demurring on the admissibility of VIE on "the impact that the defendants' alleged crimes supposedly had on the New York Police Department").

70. *See United States v. Mitchell*, 502 F.3d 931, 989 (9th Cir. 2007).

71. *See United States v. Cheever*, 423 F. Supp. 2d 1181, 1209–11 (D. Kan. 2006).

72. *United States v. Regan*, 228 F. Supp. 2d 742, 752 (E.D. Va. 2002).

principles, and the potential victims are clear.”⁷³

Finally, while the FDPA references only VIE that “identifies the victim of the offense,”⁷⁴ federal courts are similarly predisposed to admit freely personal trait evidence.⁷⁵ In *United States v. Hall*,⁷⁶ for instance, the Fifth Circuit condoned VIE relating that the victim was an aspiring doctor.⁷⁷ In *United States v. Bernard*,⁷⁸ another Fifth Circuit panel, citing Justice Souter’s concurring opinion in *Payne* that approved of “contextual evidence” relating to victims,⁷⁹ upheld admission of evidence that the victims were “youth ministers who were attending a revival meeting” on the day they were killed.⁸⁰ Because religion figured centrally in the victims’ lives, the court concluded, “it would be impossible to describe their ‘uniqueness as individual human beings’ without reference to their faith.”⁸¹

In sum, over the past fifteen years VIE has enjoyed virtually unhindered expansion and use, far surpassing in quality and scope that employed in *Booth*, *Gathers*, and *Payne*. It has become, in the words of Judge Richard Matsch, “the most problematic[] of the aggravating factors and may present the greatest difficulty in determining” the nature and scope of the information to be presented.⁸² The next section addresses the ways in which VIE has been employed in the U.S. government’s prosecution of mass killings in particular, a context that amply justifies the foregoing characterization.

II. VIE IN U.S. MASS KILLING TRIALS

While the United States is certainly no stranger to mass killings,⁸³ the era since the mid-1990s has been especially lethal. This section provides a brief overview of the capital prosecutions of defendants charged with committing these acts, with special emphasis on the federal government’s use of VIE in such trials.

73. *Id.*

74. 18 U.S.C. § 3593(a) (2000).

75. For example, parsing the language of § 3593(a), the Tenth Circuit recently elaborated on its rationale for admitting personal trait VIE, stating that “use of the phrases ‘may include’ and ‘any other relevant information’ clearly suggests that Congress intended to permit the admission of . . . evidence giving the jury a glimpse of the victim’s personality and the life he led.” *United States v. Barrett*, 496 F.3d 1079, 1099 (10th Cir. 2007).

76. 152 F.3d 381 (5th Cir. 1998).

77. *Id.* at 405.

78. 299 F.3d 467 (5th Cir. 2002).

79. *Id.* at 479 (citing *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring)).

80. *Id.*

81. *Id.* (quoting *Payne*, 501 U.S. at 823) (alteration to original in quoted text).

82. *United States v. McVeigh*, 958 F. Supp. 512, 513 (D. Colo. 1997).

83. See, e.g., *People v. Schmidt*, 165 P. 555, 557–58 (Cal. Ct. App. 1917) (dynamiting of newspaper offices in 1910 by union sympathizers, resulting in twenty-one dead); GENE WILKINS, *THE BATH SCHOOL DISASTER* 14–15 (2002) (dynamiting of primary school in 1927 by disgruntled taxpayer, resulting in 45 dead and 58 injured); Beverly Gage, *The First Wall Street Bomb*, HIST. NEWS SERVICE, available at <http://www.h-net.org/hns/articles/2001/091701a.html> (dynamiting of Wall Street in 1920 allegedly by anarchists or communists, resulting in forty dead).

A. *UNITED STATES V. MCVEIGH AND UNITED STATES V. NICHOLS*

On April 19, 1995, a rented Ryder truck, packed with two tons of ammonium nitrate and fuel oil, parked just below a second-floor day care center housed in the Alfred P. Murrah Federal Building in Oklahoma City, exploded without warning. The explosion resulted in the deaths of 168 individuals—including 19 children—and injury to almost 700 more innocents. Timothy McVeigh and Terry Nichols, American-born and -raised and bent on retaliating against the U.S. government for its 1993 siege of the Branch Davidians compound in Waco, Texas, were separately tried and convicted of the bombing.⁸⁴

At McVeigh's sentencing hearing, the government put on thirty-eight VIE witnesses: twenty-six relatives of the deceased; three injured survivors; one employee of the day care center; and eight rescue and medical workers.⁸⁵ Over the course of two full days of testimony, witnesses, very often crying or in halting voices, provided emotionally gripping and poignant accounts of their losses. One witness, who miraculously survived the bombing, testified:

I feel like I died, too, on April 19. I feel like my heart looks like that building. It has a huge hole and that can never be mended.

....

There is nothing in my life that is the same. I no longer do the same work. The only thing that is the same is the house that I live in, and now it's a house that's not a home

....

My father wants his daughter back. He wants me to be the way I was before.⁸⁶

Others spoke of the devastating aftermath of losing a loved one:

It's so hard for me because Karen was my youngest child She had not had a chance to have her babies or have her life

....

[I]t's hard for me to think about a future anymore. And I think about my

84. For discussion of the bombing, see generally MARK S. HAMM, *APOCALYPSE IN OKLAHOMA: WACO AND RUBY RIDGE REVENGED* (1997). McVeigh was convicted of conspiracy to use weapons of mass destruction, use of a weapon of mass destruction, destruction by explosives, and first-degree murder; Nichols was convicted of one count of conspiracy to use a weapon of mass destruction and eight counts of involuntary manslaughter. A third individual, Michael Fortier, who had prior knowledge of the plan to bomb the Murrah Building, cooperated with federal authorities in the McVeigh and Nichols prosecutions and pled guilty to a variety of lesser charges. Jo Thomas, *Reduced Term for Witness*, N.Y. TIMES, May 28, 1998, at A18.

85. *United States v. McVeigh*, 153 F.3d 1166, 1216 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999).

86. Trial Transcript at *40, *United States v. McVeigh*, No. 96-CR-68, 1997 WL 292341 (D. Colo. 1997) [hereinafter *McVeigh* Transcript].

future and my family's future, and . . . [it's] like a star with one of the points gone. And it's going to always be that way.⁸⁷

More gruesome but no less gripping, rescue workers provided extensive details of their heroic efforts to remove survivors and locate the dead in the Murrah Building. A sergeant with the Oklahoma City Police Department told of his efforts to extricate three adults and two children from the rubble, only finding one of the adults and one of the children alive, which left him plagued by nightmares:

I observed a hand and arm to be coming out of the debris and waving back and forth.

. . . .
I walked over and attempted to uncover the body connected to the hand. It appeared to be a female. Her hand was warm. She was clutching my hand

. . . .
I held it as it squeezed, and I could hear muffled moans from behind the concrete I could hear water running in the area; and I screamed to the other rescuers that we had to get the water turned off; that I felt she was drowning.

. . . .
The rescue worker behind the slab hollered that that wasn't water, Alan, it's blood

. . . .
[I remained with the victim] [a]pproximately three more minutes, and then her hand got very still and started to get cold. I checked for a pulse and found none.⁸⁸

The sergeant thereafter testified that after leaving the immediate scene, and heading to the area of the day care center, he was handed a baby with a brick sticking out of its forehead.⁸⁹

The sentencing of Terry Nichols, convicted of conspiracy to bomb the Murrah Building with McVeigh, made similarly extensive use of VIE. In all, fifty-five witnesses appeared on behalf of the government. In his opening remarks, prosecutor Patrick Ryan reminded jurors of the human toll of the bombing:

Death was random in Oklahoma City on April 19.

. . . .
. . . It would be tempting for you to think of this as one mass murder. Don't. These are 168 people that are all unique. They are all different. They all had

87. *Id.* at *33–34, 1997 WL 296395.

88. *Id.* at *32, 1997 WL 292341.

89. *Id.* at *33.

families and friends They went to church. They coached little league. They designed highways.⁹⁰

Ryan's forecast was soon confirmed on the witness stand.

The mother of a four-year-old child, for instance, recounted that her daughter pleaded on the day of the bombing: "Mommy Please stay home and play with me. I need you."⁹¹ Because she had just started a new job, however, she resisted and went to work, and the child later accompanied her babysitters to the Murrah Building.⁹² "[T]he next time I saw her," the mother tearfully testified, "was in a box. I buried a little, white box. I never saw her again. And I had to live with the guilt [] of . . . being a mother that had to work She was taken from me."⁹³ The bombing, she told jurors, had left her without a future.⁹⁴ "'It was gone!' she shouted, banging her hand down and turning to glare at Mr. Nichols. 'It was stolen from me!'"⁹⁵

Other witnesses testified of the personal traits of their deceased loved ones. One witness, who had rushed to the building to check on her father, a Secret Service agent who perished, testified that "[h]e was my dad. And he told me one time when I had my heart broken, . . . 'There will always be one man that will never break your heart in life, and that'll be me, your daddy.' And my heart is broken because he's not here."⁹⁶ Another told jurors of how loving her father was, relating that he had gone so far as to screen her dates by asking to see if they had a driver's license to verify that they could lawfully drive.⁹⁷ Donald Ferrell, who lost one of his two daughters, testified of his daughter's extensive charitable efforts—including work on behalf of battered women—and that she was active in her church.⁹⁸

As in *McVeigh*, the devastating emotional impact of the bombing also figured centrally in the government's case during the penalty phase. A father, for instance, testified how his child was overcome by the loss of his grandfather, manifested in his chronic behavioral disruptions at school, nightmares, and voiced desire to die so that he could join him in heaven.⁹⁹ Likewise, a man who lost his mother in the bombing testified of her wonderful qualities and how her death caused an emotional schism with his two brothers, stating that "[i]t's

90. Trial Transcript at *14, *16, *United States v. Nichols*, No. 96-CR-68, 1997 WL 790330 (D. Colo. 1997) [hereinafter *Nichols* Transcript].

91. *Id.* at *29, 1997 WL 796065.

92. *Id.*; Jo Thomas, *Emotion Fills Courtroom as Judge Calls for None*, N.Y. TIMES, Jan. 1, 1998, at A13.

93. *Nichols* Transcript, *supra* note 90, at *29, 1997 WL 796065.

94. *Id.*

95. Thomas, *supra* note 92; see *Nichols* Transcript, *supra* note 90, at *29, 1997 WL 796065.

96. *Nichols* Transcript, *supra* note 90, at *8, 1997 WL 795844.

97. *Id.* at *45, 1997 WL 793087.

98. *Id.* at *36.

99. *Id.* at *16-17.

divided our family. So I've lost my brothers over this, too."¹⁰⁰

Rescue and medical workers provided grisly accounts similar to those in *McVeigh*. One fireman, for instance, noted that five floors of the building had "pancake[d]" together and the cracks between the floors carried human body fluids "dripping down on the rescue workers while [they] were in there digging."¹⁰¹ The Director of Operations for the office of the Chief Medical Examiner of Oklahoma testified of the medical and logistical efforts by his staff to "reassociate" dismembered body parts of victims and the need to inform survivors that such parts were found, sometimes after formal burial had occurred.¹⁰² The collapse of floors of the building "produced a great deal of destruction as far as dismemberments and crushing amputations and crushed chests and heads and things like that."¹⁰³ Among other law enforcement officers providing grisly accounts, one k-9 officer testified that he had "seen a lot of blood and brain matter coming down the walls, because there was [sic] people trapped right above us," and that he had transported from the scene a dead little boy whose "face was completely gone" and whose "chest cavity was completely open."¹⁰⁴ One victim in particular "had a look on his face"—"the impact of the blast was on his face"—that caused the officer to have nightmares.¹⁰⁵

B. UNITED STATES V. BIN LADEN

On August 7, 1998, the U.S. Embassy in Nairobi, Kenya was bombed, leaving 213 dead and nearly 5,000 wounded.¹⁰⁶ U.S. authorities eventually apprehended, tried, and convicted a follower of Osama Bin Laden for the bombing, twenty-four-year-old Mohamed Rashed Daoud Al-'Owhali, who fled the vehicle that delivered the truck bomb and survived the blast.¹⁰⁷ The United States employed twenty-six VIE witnesses during the sentencing phase. Prosecutor Patrick Fitzgerald set the stage for the ensuing testimony:

Let me talk to you now about victim impact, which I submit to you is the most important aggravating factor for you to consider You need to understand the pain, the horror and the agony that the bombing put so many

100. *Id.* at *24.

101. *Id.* at *36–38, 1997 WL 796065.

102. *Id.* at *15, *18–19, 1997 WL 790551.

103. *Id.* at *16.

104. *Id.* at *20–21, *23, 1997 WL 796065.

105. *Id.* at *25.

106. Almost simultaneously, the U.S. Embassy in Dar es Salaam, Tanzania exploded, killing eleven and wounding dozens. YOSSEF BODANSKY, *BIN LADEN: THE MAN WHO DECLARED WAR ON AMERICA* 1 (1999).

107. U.S. authorities arrested and prosecuted three others for the Kenya and Tanzania bombings: Khalfan Khamis Mohamed, twenty-seven, of Tanzania; Mohammed Sadeek Odeh, thirty-five, of Jordan; and Wadih El-Hage, forty, a naturalized U.S. citizen born in Lebanon. *Id.* at 5. In a combined jury trial, the latter two defendants were convicted of conspiracy and faced maximum terms of life without parole, while Al-'Owhali and Khalfan Khamis Mohamed were convicted of the actual bombings and faced death. *Id.* at 11.

people, so many families through. You need to weigh that in the balancing, in making your reasoned, moral judgment as to the appropriate penalty.¹⁰⁸

After providing a detailed overview of the suffering wrought by the bombing, Fitzgerald told jurors:

It's not going to be easy for you to sit there and listen and hear and feel that pain. That's only natural that you may sit there and say to yourself at some point, do I really need to hear this? Did I really need to see this? . . .

Make no mistake about it, you do . . . You're entitled to the most serious information and you must weigh the pain of that horror that the defendant Al-'Owhali caused by his bomb in making your decision . . . It's the defendant Al-'Owhali who is responsible for that snapshot of horror and pain that you will see.¹⁰⁹

With Fitzgerald seated, the defense, presumably in an effort to inoculate itself to some degree against the flow of emotional testimony to come, proceeded to read to the jury the names of the 213 individuals who died in the bombing,¹¹⁰ and offered that "[t]here will be no evidence presented in this case that anyone who lost a loved one . . . is not suffering. I will not offer any information, nor does any exist that will lessen that degree of suffering."¹¹¹

The ensuing testimony contained a torrent of highly emotional and dramatic testimony, complemented by videos and photos. The government's first witness, who lost her husband of twenty-eight years as well as her twenty-year-old son, read a lengthy written statement highlighting their wonderful personal qualities and the extraordinary emotional toll their deaths had on her.¹¹² Similar testimony by others followed, including from one witness who lost her husband—whom she described as having “this heart for people, and was so kind, and considerate . . . [A] knight”¹¹³—and learned that she was pregnant when she returned home from Kenya.¹¹⁴ A husband testified at length about his wife, noting that she “was a very committed member of our village[,] to our clan[,] and the community as a whole,” serving as a volunteer leader in development and educational projects.¹¹⁵ Blast survivors told of serious medical hardships such as blindness and spinal injuries requiring extensive surgery and hospitaliza-

108. Trial Transcript at 6677–78, *United States v. Bin Laden*, No. S(7) 98CR1023 (S.D.N.Y. May 30, 2001), available at <http://cryptome.org/usa-v-ubl-56.htm> [hereinafter *Bin Laden* May 30 Transcript].

109. *Id.* at 6687.

110. *Id.* at 6692–95.

111. *Id.* at 6695–96.

112. *Id.* at 6712–17.

113. *Id.* at 6756.

114. *Id.* at 6759.

115. Trial Transcript at 6817–18, *United States v. Bin Laden*, No. S(7) 98CR1023 (S.D.N.Y. May 31, 2001), available at <http://cryptome.org/usa-v-ubl-57.htm> [hereinafter *Bin Laden* May 31 Transcript].

tions in Kenya and abroad, as well as extreme emotional scars impairing their ability to continue life and work.¹¹⁶

Medical and rescue workers again provided extensive testimony. One nurse practitioner, for instance, testified of the scene in the local hospital:

It was maybe three minutes from the explosion . . . a sudden wall of broken bodies began descending from buses and cars

Battalions of cleaners kept mops and buckets in full swing to stem the progressive reddening of our pale green walls and floors. Not people but crowds, herds even, pushed endlessly through the doors . . . leaning, limping, dragging, and carried in on top of each other with no end in sight, bloody and bleeding and broken.¹¹⁷

A doctor who had been stationed in Germany—where victims with the worst eye injuries were sent—testified to the extensive surgeries performed on the patients.¹¹⁸

C. UNITED STATES V. MOUSSAOUI

On September 11, 2001, four groups of al-Qaeda sympathizers hijacked commercial airplanes and crashed them into the World Trade Center in New York City, the Pentagon in Northern Virginia, and rural farmland in Western Pennsylvania (short of its apparent target, the U.S. Capitol or the White House).¹¹⁹ Just under 3000 individuals were killed on 9/11,¹²⁰ and more than 2600 were injured;¹²¹ and, along with billions of dollars in economic harm,¹²² the nation's psychic sense of security and safety was extinguished.¹²³

With the nineteen 9/11 aircraft hijackers killed as a result of their suicidal assaults, authorities eventually singled out for federal indictment Zacarias Moussaoui, a thirty-three-year-old French national of Moroccan ancestry, who at the time of the hijackings had been in custody in Minnesota on immigration-related charges. Moussaoui, the government alleged, was a sworn member of al-Qaeda and had conspired to participate in a mass terrorist assault on U.S. interests by means of airplanes, and had acted to this end by, among other things, taking

116. See, e.g., *Bin Laden* May 30 Transcript, *supra* note 108, at 6721, 6778–79, 6797–98.

117. *Id.* at 6743–44.

118. *Id.* at 6787–92.

119. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES: THE 9/11 COMMISSION REPORT 1–14 (2004) [hereinafter 9/11 COMMISSION REPORT].

120. *Id.* at 311.

121. KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 96 tbl.1 (2004).

122. U.S. GEN. ACCOUNTING OFFICE, CATASTROPHE INSURANCE RISKS: STATUS OF EFFORTS TO SECURITIZE NATURAL CATASTROPHE AND TERRORISM RISKS 1 (2003) (estimating \$80 billion in insured and uninsured losses).

123. TOM PYSZCZYNSKI ET AL., IN THE WAKE OF 9/11: THE PSYCHOLOGY OF TERROR 6–7 (2003).

flight instruction classes.¹²⁴ Moussaoui, dubbed the “twentieth hijacker,” faced the death penalty on four of the six conspiracy counts charged.¹²⁵

After extended delays, stemming primarily from his objections to counsel and quite successful efforts to confound the U.S. justice system with evidentiary and other demands, Moussaoui eventually pled guilty to six counts of conspiracy.¹²⁶ Jurors thereafter found Moussaoui guilty of causing at least one death, as a result of lying to federal investigators prior to 9/11, rendering him eligible for the death penalty.¹²⁷

In anticipation of presenting its VIE, the government undertook an unprecedented effort to create a witness database, consisting of interviews with more than 8000 individuals affected by 9/11.¹²⁸ As a result of this process, “several hundred” individuals expressed an interest in testifying at Moussaoui’s sentencing hearing,¹²⁹ of which thirty-five ultimately provided VIE to the sentencing jury.¹³⁰

Much as in the trials just discussed, the government opened with a preview of its VIE, with Assistant U.S. Attorney David Novak highlighting some of the most tragic and poignant stories that were to come:

Over the next several days you will hear many, not all, but many voices of pain and anguish and terror and death And you’ll hear voices of physical and emotional suffering, of permanent disability and disfigurement that have haunted and will haunt for years.

....

Now, it’s one thing for one of us to stand up and to tell you that the September 11 attacks were horrific and to list for you the number of murder victims, 2,972, on that day, but the number and the words fail to capture the enormity and the horror of that crime. That can really only be conveyed by the voices of the victims and their families.¹³¹

The government proceeded to call as its first VIE witness former New York

124. Indictment at 1, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003), available at <http://www.undoj.gov/ag/mouss21.htm>.

125. Brooke A. Masters, *Prosecutors Will Seek Terror Suspect's Death; Man Is Accused of Conspiring with Hijackers*, WASH. POST, Mar. 29, 2002, at A4.

126. Stewart M. Powell, *Moussaoui Fate Up To Jury; Federal Panel Next Week Will Decide If Al-Qaida Operative Lives or Dies*, TIMES UNION (Albany, N.Y.), Jan. 29, 2006, at A15.

127. Greg Gordon, *Moussaoui a Step Closer to Death*, STAR TRIB. (Minneapolis, Minn.), Apr. 4, 2006, at 1A.

128. Jerry Markon, *Moussaoui Trial To Bring Attacks Back for Jury*, WASH. POST, Apr. 6, 2006, at A12.

129. See Government’s Motion Pursuant to the “Justice for All Act” at 2, *United States v. Moussaoui*, No. 01-455-A (E.D. Va. Dec. 6, 2005) [hereinafter “Justice for All Act” Motion].

130. Neil A. Lewis, *Moussaoui Given Life Term by Jury over Link to 9/11*, N.Y. TIMES, May 4, 2006, at A5.

131. Trial Transcript at 2883, *United States v. Moussaoui*, No. 01-455-A (E.D. Va. 2006) [hereinafter *Moussaoui Transcript*].

City Mayor Rudolph Giuliani,¹³² who at length vividly recounted the catastrophic effects the attacks had on New York City and the heroic efforts of police, fire, and medical personnel to save and recover the injured and dead.¹³³ When asked about the effect 9/11 had on him personally, the Mayor spoke of his recurring recollection of seeing two people jump out of the towers holding hands, later stating that the tragedy "meant the loss of friends I can't replace [E]very day I think about it, every day some part of it comes back to me. It can be the person jumping or seeing the body parts . . . or seeing a little boy or girl at a funeral."¹³⁴ With voice quaking, and all eyes in the courtroom focused on him, Giuliani also told jurors about how his long-time administrative assistant, whose firefighter husband died while rescuing victims, phoned him about a week after 9/11 to say that she was pregnant.¹³⁵ The ex-mayor recounted the great joy and sadness he experienced at hearing the news, knowing that the child would "grow up . . . without a very special father."¹³⁶

Mayor Giuliani's testimony was followed by that of Tamar Rosbrook, who was staying in a hotel near the Trade Center at the time of impact, and, although seriously injured herself, captured on video the horrific scene in lower Manhattan.¹³⁷ Through tearful testimony, and amid what two reporters termed sobs "uncontrollable and contagious" to those in the courtroom,¹³⁸ Ms. Rosbrook narrated footage revealing human remains falling from the sky and individuals, some engulfed in flames, desperately jumping from the buildings in a hopeless effort to escape.¹³⁹

In addition to using other video clips, numerous photos of severely charred human and physical carnage at all three bombing sites, and audiotapes of horrific 911 calls made by desperate victims trapped within the burning towers (synchronized with video images of the burning towers),¹⁴⁰ prosecutors relied on emotionally searing personal accounts to convey the massive losses experienced that day. The testimony included that from:

132. See Niles Lathem, *Giuliani To Face Evil Zac—Witness in Death Case*, N.Y. POST, Apr. 6, 2006, at 3 (referring to Giuliani as "America's Mayor" and calling testimony a "showdown" with the defendant that promised "to provide one of the most powerful and symbolic moments" of the trial).

133. See *Moussaoui* Transcript, *supra* note 131, at 2913–96.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 2999–3009.

138. Jerry Markon & Timothy Dwyer, *Horror Takes the Stand at the Moussaoui Trial*, WASH. POST, Apr. 7, 2006, at A01.

139. See *id.*; *Moussaoui* Transcript, *supra* note 131, at 2999–3009.

140. In one tape, for instance, a forty-six-year-old father of three, stranded on the 105th floor of the south tower, frantically pleaded: "'Lady, there's two of us in this office. We're not ready to die but it's getting bad.' . . . 'Oh, please hurry; I've got young kids.' . . . 'Oh my God, ohhh.'" Neil A. Lewis, *Moussaoui Jury Hears from Grieving Families, and from Victims Themselves*, N.Y. TIMES, Apr. 11, 2006, at A16. In another tape, the caller, trapped on the eighty-third floor, cried: "'It's so hot; it's very, very hot.' . . . 'All I see is smoke; I'm going to die.' . . . " *Id.*

- a firefighter, since retired as a result of guilt he felt over surviving the trauma when so many fellow firefighters did not, who recounted watching in horror as a colleague was fatally hit by a person who had jumped from one of the burning buildings;¹⁴¹
- a wife, whose husband died in the attack and whose young son was later diagnosed with a severe developmental disability, who told of her struggles to raise her son alone while taking care of other sick family members and revealed her emotionally devastated son's desire to "be an astronaut so he can go to space some day to look for his daddy";¹⁴²
- a sister, who after frantically searching for her sister without success, eventually did find her in a hospital, bandaged from head to toe with ultimately fatal burns so severe that they defied medical classification, testifying that her parents, who watched their daughter suffer through fourteen surgeries over forty-one days, were "shells of the people that they once were";¹⁴³
- a brother, who told of how his sister became so depressed over the loss of her husband that she continuously played a phone message the husband left just before his death and eventually hanged herself from an exercise machine in her home;¹⁴⁴ and
- a husband, who recounted how the death of his daughter caused his wife to become a recluse in their home.¹⁴⁵

To culminate their case, prosecutors offered the first public airing of the cockpit recording of the plane that crashed in Pennsylvania on 9/11, revealing the dramatic struggle of heroic passengers to ward off the hijackers, complemented by a simultaneous video indicating its speed and errant path.¹⁴⁶ After introducing a large poster containing photos of decedents and four large loose leaf volumes containing 408 letters from victims and survivors, the government rested.¹⁴⁷

III. STRAINING THE PARADIGM

As the preceding suggests, VIE in mass killing prosecutions differs in important ways from that introduced in the more conventional death penalty cases surveyed earlier. This Part critically examines the points of divergence, highlighting ways in which common concerns over VIE are mitigated or

141. *Moussaoui* Transcript, *supra* note 131, at 3014–32.

142. *Id.* at 3043–51.

143. *Id.* at 3149–59.

144. *Id.* at 3082–99; Phil Hirschhorn, *9/11 Victims Share Heartache with Moussaoui Jury*, CNN.COM, Apr. 7, 2006.

145. *Id.* at 3066–73.

146. *Jury Hears Passengers Take On Hijackers on Doomed Plane*, BIRMINGHAM POST (U.K.), Apr. 13, 2006, at 19.

147. *See id.*; *see also* Greg Gordon, *Dramatic Note Ends Moussaoui Sentencing*, STAR TRIB. (Minneapolis), May 5, 2006, at 1A.

enhanced, and then questions, in light of this distinctiveness, the fundamental role of VIE in mass killing prosecutions.

A. VIE IN THE VARIED CONTEXTS

By virtue of the massive scale of death and destruction they seek to redress, mass killing prosecutions could be regarded as *sui generis*, offering little basis for comparative analysis. Yet, the prosecutions inextricably remain part of the criminal justice process,¹⁴⁸ with its associated trappings—including VIE—and thus provide an illuminating basis to explore some of the commonly voiced criticisms of VIE.

As an initial matter, it might be said that the mass killing context mitigates a cluster of traditional concerns over VIE. Among these is that VIE is too adventitious—that a death sentence should not be permitted to turn on the happenstance of victims' personal qualities and the loss experienced as a result of their murder,¹⁴⁹ which can be idiosyncratic in nature.¹⁵⁰ Concern has also been voiced about the possibility that VIE encourages use of a "comparative worth" calculus¹⁵¹—in other words, that when provided with information on the personal traits of victims, the sentencing authority will naturally tend to compare victims' and defendants' relative value and tailor a death decision accordingly.¹⁵²

Such concerns, however, are diminished in the context of mass killing trials. In actuarial terms, the sheer number of victims logically lessens the adventitious nature of VIE: with a greater death toll, there naturally comes an increased likelihood that victims with positive personal traits will perish and that there

148. This point was consciously driven home by prosecutors in *Moussaoui*, who repeatedly referred to the events of 9/11 as "murders" and a "crime."

149. For examples of critical commentary to this effect, see generally, for example, Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996); Amy K. Phillips, Note, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93 (1997); see also *Booth v. Maryland*, 482 U.S. 496, 506 (1987) ("[T]here [is no] justification for permitting [the death penalty] decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character.") (footnote omitted); *id.* at 505 ("Allowing the jury to rely on [VIE] . . . could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill.").

150. See Logan, *supra* note 48, at 160–65 (surveying examples such as divorces, familial separations, heart attacks, and other medical and emotional hardships).

151. For discussion of the role comparative-worth arguments have come to play, see Erin McCampbell, Note, *Tipping the Scales: Seeking Death Through Comparative Value Arguments*, 63 WASH. & LEE L. REV. 379 (2006). The *Payne* Court expressly disapproved of victim-victim comparisons in particular. See *Payne v. Tennessee*, 501 U.S. 808, 823 (1991) (stating that VIE "is not offered to encourage" comparisons between "victims [who] were assets to their community . . . [and] victims [who] are perceived to be less worthy").

152. To Blackstone at least, such a comparison was of no ultimate effect: "[T]he execution of a needy decrepid [sic] assassin is a poor satisfaction for the murder of a nobleman in the full bloom of his youth, and full enjoyment of his friends, his honours, and his fortune." 4 WILLIAM BLACKSTONE, COMMENTARIES *13 (1783).

will result personal losses of a severe and possibly idiosyncratic nature.¹⁵³ The moral luck of victims and personal losses, a matter of enduring concern to criminal law theoreticians,¹⁵⁴ is correspondingly less at issue in mass killings because, presuming the defendant intended the mass targeting, the risk presented *ex ante* carries with it a greater deserved culpability.¹⁵⁵ Likewise, less concern exists over the varied capacity of witnesses to convey persuasively such harms, which raises arbitrariness concerns in conventional trials,¹⁵⁶ insofar as the exponentially greater number of victims proportionately enhances the *ex ante* likelihood of effective witnesses.¹⁵⁷ Finally, the prospects for comparative-worth assessments are lessened; with the massive degree of human injury and death, focus on "each victim's uniqueness"¹⁵⁸ is diffused to the point of abstraction, undercutting possible inclination toward one-to-one comparisons.¹⁵⁹

These possibilities, however, must be balanced against what are quite clearly a variety of ways in which VIE in mass killing prosecutions exacerbates traditional concerns about VIE and presents new, potentially more problematic ones.

1. Emotionalism

Perhaps foremost, the mass killing context exacerbates the common worry that VIE undercuts the sought-after reasoned objectivity of capital trials.¹⁶⁰ In death penalty proceedings, "emotion [is] everywhere"¹⁶¹ and this pathos was surely increased by *Payne*. In the context of mass killing trials, however, emotionalism is correspondingly increased, which, as Zacarias Moussaoui harshly

153. See *United States v. McVeigh*, 153 F.3d 1166, 1221 (10th Cir. 1998) ("[T]he jury could not have been shocked to learn that some victims had exemplary backgrounds and poignant family relationships, nor that they left behind grief-stricken loved ones.").

154. See, e.g., MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 191–218 (1997); BERNARD WILLIAMS, *MORAL LUCK: PHILOSOPHICAL PAPERS*, 1973–1980, at 20–39 (1981).

155. See Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 393–97, 411–12; cf. Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 425 (2003) ("[P]eople view adventitious consequences as less adventitious when the harm is serious than when the harm is minor.").

156. See *Payne*, 501 U.S. at 846 (Marshall, J., dissenting); *Booth v. Maryland*, 482 U.S. 496, 505–06 (1987).

157. This potential lessening of philosophic concern, however, does not diminish the practical outcome of the government enjoying an increased pool of persuasive or attractive witnesses upon which to draw. For further discussion of the significance of this, see *infra* notes 202–09 and accompanying text.

158. *Payne*, 501 U.S. at 823 (internal quotation marks omitted).

159. As a technical matter, this prospect is further checked by the requirement in the FDPA that jurors certify that the race, color, religious beliefs, national origin, and sex of the victim and defendant did not influence their decisions. See 18 U.S.C. § 3593(f) (2000).

160. See *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[T]he sentence imposed at the penalty stage should reflect a reasoned *moral* response . . . rather than mere sympathy or emotion.").

161. Joan W. Howarth, *Deciding To Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1396.

put it in one of his many diatribes, threatens transforming capital trials into a "Hollywood Deadly Circus."¹⁶²

This heightened emotionalism derives from *Payne* itself, which allows for evidence of "specific harm" and requires only that VIE not be "unduly prejudicial" in the context of the proceeding as a whole.¹⁶³ Trial and appellate courts, accustomed to conducting a relativistic assessment that raises or lowers the threshold of permissible VIE in accord with the destructive extent of the defendant's acts,¹⁶⁴ naturally up the ante of permissible VIE in mass killing prosecutions.

McVeigh illustrates this tendency. The Tenth Circuit, faced with a challenge over the two full days' worth of highly emotional VIE, during which the normally stoic Judge Richard Matsch and jurors were frequently reduced to tears,¹⁶⁵ concluded that "[t]he magnitude of the crime cannot be ignored The sheer number of actual victims and the horrific things done to them necessarily allows for the introduction of a greater amount of victim impact testimony in order for the government to show the 'harm' caused by the crime."¹⁶⁶ The thirty-eight VIE witnesses, the panel emphasized, "comprised an extremely small percentage of the number of potential witnesses the government might have called to testify about the 168 victims who died in the blast and the impact of the explosion on the numerous injured victims."¹⁶⁷

Further evidence of what might be called the "*McVeigh* metric"¹⁶⁸ is found in the *Al-'Owhali* sentencing hearing. There the following colloquy occurred:

[Defense]: Your Honor, there is not one of us that leaves our humanity at the door when we come in here, and it is hard to stand up here and play the grinch in the sense of trying to minimize in a legal sense what cannot be minimized in the human sense.

.....
The fact is that what we have gotten is witness after witness who tells us the same thing that we all know, which is that whenever you have someone

162. John Riley, *9/11 Victims' Last Words Played at Trial*, *NEWSDAY* (N.Y.), Apr. 11, 2006, available at <http://www.newsday.com/news/local/newyork/ny-usmous0411,0,4056457.story>. According to one news report, on some days of the trial, as many as six of the seventeen jurors or alternates visibly wept during the presentation of VIE. See Michael J. Sniffen, *Moussaoui Jury Shown Gruesome Photos of 9/11 Pentagon Victims*, *MOBILE REGISTER* (Ala.), Apr. 12, 2006, at A6.

163. *Payne*, 501 U.S. at 825.

164. See Logan, *supra* note 48, at 185–87.

165. See John Gibeaut, *The Last Word: Jury Is Still Out on Effects of Victim Impact Testimony*, A.B.A. J., Sept. 1997, at 42, 43; Peter Gerner, *Empathy vs. Impartiality in the Courtroom: Victims Leave Lasting Impact on the System*, *CHI. TRIB.*, June 15, 1997, at 1.

166. *United States v. McVeigh*, 153 F.3d 1166, 1221 (10th Cir. 1998).

167. *Id.* at 1216.

168. The concept is not to be confused with what Scott Sundby has referred to as the "McVeigh factor"—the sentiment, even among individuals inclined to oppose the death penalty, that for some crimes death is the only justifiable punishment. See Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 *TEX. L. REV.* 1929, 1958 (2006).

who dies there is familial loss, which is terrible, and that there are consequences to that that are financial as well I understand it is supposed to be somewhat prejudicial but we have to draw a line-somewhere.

....
[Court]: What is a fair balance? Two hundred killed and 5,000 injured and what is the calculus of that?

[Defense]: I don't know, but it is not a mathematical analysis It is your discretion but we have had enough I want to weep and stop myself . . . it is a roller coaster and it is enough.

....
[Court]: I think you have made your point

[Gov't]: The only thing I would like to say in response, your Honor, I think we have made a restrained offering. The number of victims compared to the witnesses, the witnesses that have spoken have carried themselves with great dignity and restraint They have gone out of their way to fight back emotion and restrain themselves. I think it is appropriate that another 15 tell their story to the jury.

[Court]: I agree with the government's characterization of what has occurred here There was a time, we all know, when the Supreme Court said this type of testimony was inadmissible. The Supreme Court in its infinite wisdom has recognized that that was an erroneous position.

....
The objection is overruled.¹⁶⁹

In sum, *Payne*'s authorized "'quick glimpse of the life' which [the] defendant 'chose to extinguish'"¹⁷⁰ plainly assumes modified meaning in the context of mass killings. Because of their toll, courts are inclined to admit correspondingly more in the way of VIE, unavoidably affecting the emotional tenor of capital trials and eclipsing the possibility of meaningful due process review.

2. Demarcating the Permissible Bounds of VIE

A second chief area in which mass killing VIE raises greater concern is the enduringly difficult yet core question of who should be eligible to provide VIE and the forms of recognized "impact."

With respect to the backgrounds of those qualified to testify, the hydraulic pressure alluded to above has resulted in the government's having a virtual free hand in its VIE witness roster. Federal courts, already prone to extend the permissible pool of witnesses beyond family to include teachers, neighbors, friends, school classmates, and even co-workers,¹⁷¹ have allowed a vast array of individuals to testify in mass killing trials, including medical rescue workers (at the site and at distant hospitals), police and fire personnel, and even government

169. *Bin Laden* May 30 Transcript, *supra* note 108, at 6808–11.

170. *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

171. *See* Logan, *supra* note 57, at 7, 10 n.54.

officials (including ex-Mayor Giuliani).¹⁷² Again, neither *Payne* nor the FDPA prohibit such an expansive understanding, and the diversity of witnesses, as John Donne would have it,¹⁷³ doubtless suffered harm.¹⁷⁴ However, recognition of their status as victims risks straining the concept of victimhood beyond meaningful recognition, with corresponding dilution of its significance.¹⁷⁵

Similar breadth is evident on the closely related issue of what qualifies as "impact." In contrast to *Payne*, where the VIE solely concerned the emotional harm suffered by a young boy as a result of the murder of his mother and sister in his presence,¹⁷⁶ VIE in mass killing cases admits of no discernible limit.¹⁷⁷

172. See, e.g., *supra* notes 101, 102, 117–18, 132–34 and accompanying text.

173. See 3 JOHN DONNE, *No. XVII, DEVOTIONS UPON EMERGENT OCCASIONS* (1624), reprinted in *THE WORKS OF JOHN DONNE* 493, 575 (John W. Parker ed., 1839) ("No man is an island, entire of itself; every man is a piece of the continent, a part of the main; . . . any man's death diminishes me, because I am involved in mankind . . ."); cf. George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 56 (1999) (concluding that "I am afraid there is no easy solution to the problem of identifying the relevant victim in homicide cases").

174. Terrorist attacks have been characterized as entailing unique "circles of vulnerability," consisting of four groups of victims radiating in concentric fashion from "survivors." See K. Chase Stovall-McClough & Marylene Cloitre, *Traumatic Reactions to Terrorism: The Individual and Collective Experience*, in *PSYCHOLOGICAL EFFECTS OF CATASTROPHIC DISASTERS: GROUP APPROACHES TO TREATMENT* 113, 122–23 (2006). Non-survivor groups include: "[f]irst-degree relatives/loved ones"; "[e]mergency rescue and recovery personnel"; "[s]upport networks (e.g., friends, family, mental health professionals)"; and "[w]ider sociopolitical community (e.g., government, Americans, New Yorkers)." *Id.* at 122 fig.6.1.

175. See CHARLES J. SYKES, *A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER* 18 (1992) ("If everyone is a victim, then no one is.") (emphasis omitted); James E. Bayley, *The Concept of Victimhood*, in *TO BE A VICTIM: ENCOUNTERS WITH CRIME AND INJUSTICE* 53, 58 (Diane Sank & David I. Caplan eds., 1991) ("When loss sufferers are indiscriminately called victims, meaningful differences . . . are lost, and this loss in turn entails loss of appropriate response . . .").

The tendency is also striking for its asymmetry vis-à-vis other areas of the law. First, as Susan Bandes helpfully noted when commenting on a prior draft, such a broad understanding of victim status conflicts with the way tort law often conceives of victimhood, such as in negligent infliction of emotional distress cases. See also DAN B. DOBBS, *THE LAW OF TORTS* 833–41 (2000) (examining use of strict plaintiff eligibility criteria, such as the "zone of danger" test); cf. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100–01 (N.Y. 1928) (Cardozo, J.) (asserting that despite the tortious behavior of the defendant no duty was owed to the victim; "[t]he risk reasonably to be perceived defines the duty to be obeyed"). Second, it conflicts with other criminal law contexts where impact is considered but victim status is quite narrowly drawn. See, e.g., *United States v. Terry*, 142 F.3d 702, 710–12 (4th Cir. 1998) (rejecting proposed sentence increase under U.S. Sentencing Guidelines for involuntary manslaughter conviction because there was "no evidence that the families in question had any relationship to the offense beyond their relationship to the direct victims.").

176. See *supra* notes 23–40 and accompanying text.

177. Voicing this concern, Richard Burr, McVeigh's lawyer, in his ultimately unsuccessful effort to bar VIE from those not losing loved ones, plaintively inquired:

[I]f people who are indirectly affected, even grievously, by an incident, can be allowed to give victim impact testimony about their condition, where does the line get drawn? For example, . . . there has been an epidemiological study done in Oklahoma City to assess the effects of this on the entire population in the city. [Should this be admitted?]

McVeigh Transcript, *supra* note 86, at *16, 1997 WL 290019. Faced with the difficult line-drawing challenge on admissibility, Judge Matsch could only offer as his guiding criteria that "it's kind of a foreseeability aspect." *Id.*

The VIE touched on myriad psychological, emotional, economic, social, and physical harms, of an immediate and long-term nature, consistent with the uniquely destructive and destabilizing phenomenon of mass killings.¹⁷⁸ As one VIE witness in *Moussaoui* offered, 9/11 affected “not only . . . the persons that lost loved ones,” it also affected “every American []—every American is a victim.”¹⁷⁹

Moreover, VIE in mass killing trials differs in the important sense that it can concern how state, local, and national governments have been adversely affected. In *Moussaoui*, for instance, the lead prosecutor offered in his closing that the VIE was proffered in the name of showing that the “whole nation suffered,”¹⁸⁰ and jurors were asked to (and unanimously did) find myriad harmful physical, financial, and operational consequences to New York City and the U.S. government.¹⁸¹

Permitting the government to claim direct victim status, while again not without factual basis, is not without consequence. While unusual enough in U.S. criminal law more generally,¹⁸² the status transformation is especially problematic in the context of capital trials, where the government seeks to impose its maximum sanction. As Susan Hirsch, herself a survivor of a terrorist bombing in Africa,¹⁸³ has commented:

Defenders of the death penalty insist that it can be viewed as an act of retribution—not of vengeance—and thus remain consistent with the concept of just punishment. Yet the argument becomes strained when the same

178. As noted by Professors Stovall-McClough and Cloitre, mass killings engender unique trauma for at least two reasons. The first reason stems from the intentional and organized effort they typically entail—they are “carefully designed to maximize fear and suffering.” “This characteristic adds a layer of malevolence that dramatically increases the sense of violation in victims.” Second, they impose unique “collective” harm:

Terrorism is a shared experience because attacks are most often directed toward *groups* of people rather than individuals In addition, the particular group of people attacked is often chosen based upon their symbolic membership in a larger racial, ethnic, or sociopolitical community. Thus, there is both a direct attack on a set of individuals and an indirect attack on an entire identified sociopolitical community.

Stovall-McClough & Cloitre, *supra* note 174, at 119. For more on the unique psychological effects of terrorism, see generally *PSYCHOLOGY OF TERRORISM* (Bruce Bongor et al. eds., 2007).

179. *Moussaoui* Transcript, *supra* note 131, at 3575. For a discussion of the national psychological consequences of 9/11, see Roxane Cohen Silver et al., *Nationwide Longitudinal Study of Psychological Responses to September 11*, 288 JAMA 1235 (2002); Bradley D. Stein et al., *A National Longitudinal Study of the Psychological Consequences of the September 11, 2001 Terrorist Attacks: Reactions, Impairment, and Help-Seeking*, 67 PSYCHIATRY 105 (2004).

180. Phil Hirschhorn, *Jury Deliberations Begin in 9/11 Trial*, CNN.COM, Apr. 24, 2006, available at <http://www.cnn.com/2006/LAW/04/24/moussaoui.trial/index.html>.

181. See Special Verdict Form for Phase II (Completed), *Moussaoui* (E.D. Va.) (No. 01-CR-0045), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/72434/0.pdf> [hereinafter Special Verdict Form].

182. See generally MARKUS DUBBER, *VICTIMS IN THE WAR ON CRIME* 221–22 (2002).

183. SUSAN F. HIRSCH, *IN THE MOMENT OF GREATEST CALAMITY: TERRORISM, GRIEF, AND A VICTIM'S QUEST FOR JUSTICE I* (2006).

government that prosecutes the crime and carries out the sentence is also positioned as the target of the attack Tempering the power of any government always poses a challenge but becomes especially difficult when the state, as a victim, might choose the prerogative that individual victims sometimes claim when they act on vengeance.¹⁸⁴

3. Witness Harm

Another way in which mass killing VIE accentuates concerns with VIE more generally relates to its effect on those whose interests it seeks to vindicate—persons suffering harm at the hands of killers. A prime reason for the popularity of VIE is that it affords those most directly affected by crime a voice in punishment decisions, theoretically at once empowering them and providing a chance for emotional catharsis.¹⁸⁵ Whether these goals should be sought¹⁸⁶ and are in fact achieved¹⁸⁷ in conventional capital trials remains the subject of considerable debate and controversy.

The unique circumstances of mass killing prosecutions, however, carry an even greater threat of anti-therapeutic outcomes, as VIE witnesses in *Moussaoui*¹⁸⁸ and *McVeigh*¹⁸⁹ attest. In mass killing trials, the government, pressed to craft a compelling harm narrative, often resorts to courtroom *modus operandi* at odds with the therapeutic needs of victims. As Susan Hirsh has observed:

The state's goals shape victims' stories; the prosecution must keep a victim focused not on what had the most impact for the victim but what will have the most impact in convincing a jury to impose the harshest penalty [Victims] are urged to avoid outbursts and asked not to cry. Others are steered by prosecutors' questions to areas they might not have wanted to speak about, such as personal emotional trauma, household intimacies, or their financial circumstances.¹⁹⁰

"[T]he penalty phase," Hirsh concludes, "promises agency to victims but often delivers something quite different."¹⁹¹ This anti-therapeutic climate, in

184. *Id.* at 251.

185. See *Payne v. Tennessee*, 501 U.S. 808, 832 (1991) ("Murder is the ultimate act of depersonalization. It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back." (citation omitted)).

186. See generally Henderson, *supra* note 46.

187. See Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545, 552 (1999); cf. PRIMO LEVI, *THE DROWNED AND THE SAVED* 24 (Raymond Rosenthal trans., Summit Books 1988) (1986) ("[T]he memory of a trauma suffered or inflicted is itself traumatic because recalling it is painful or at least disturbing.").

188. See Pete Yost, *Flight 93 Families Relive 9/11 Nightmare*, ASSOCIATED PRESS, Apr. 12, 2006.

189. See Jody Lynéé Madeira, *No Closing 9/11's Open Wounds*, BOSTON HERALD, Apr. 8, 2006, at 19.

190. HIRSCH, *supra* note 183, at 182.

191. *Id.* at 183.

turn, can be exacerbated if, as in *Moussaoui*¹⁹² and *McVeigh*,¹⁹³ victims are subjected to the public ridicule of unrepentant killers who defiantly scoff at or mock their hardships in front of millions of onlookers.¹⁹⁴

Mass killing trials also impose unique harms by accentuating the personal differences among victims. Persons suffering criminal harm can and very often do experience it in varied ways and differ on questions of fundamental importance,¹⁹⁵ including on whether death should be imposed.¹⁹⁶ With the greater number of victims there naturally comes a greater prospect for differing senti-

192. See *Moussaoui* Transcript, *supra* note 131, at 3664 (testimony of Moussaoui) ("I find it disgusting that some people will come here to share their grief in order to obtain the death of somebody else."); Michael J. Sniffen, *Moussaoui Gloats During Testimony "No Regret, No Remorse" Trial: 9/11 Conspirator Calls Testimony of Grieving Witnesses "Disgusting,"* LONG BEACH PRESS-TELEGRAM (Cal.), Apr. 14, 2006, at A21 (noting that Moussaoui openly mocked VIE witnesses who testified of the heroism of deceased members of the armed services); see also Neil A. Lewis, *Moussaoui, Testifying Again, Voices Glee Over Witnesses' Accounts of Sept. 11 Grief*, N.Y. TIMES, Apr. 14, 2006, at A1. Moussaoui's cruelty continued into the actual formal sentencing proceeding itself when he ridiculed three witnesses for their expressed grief over lost loved ones employed by the federal government. See Chris Casteel, *Victims, Judge Scold Moussaoui in Court*, OKLAHOMAN, May 5, 2006, at 8A.

193. See Madeira, *supra* note 189, at 19 (noting McVeigh's dismissive treatment of VIE witnesses). McVeigh's execution, in turn, provided no solace for survivors, as he remained stoically unrepentant even when strapped to the execution room gurney and defiantly quoted the poem *Invictus*. See Pam Belluck, *The McVeigh Execution: The Scene: Calm at Execution Site and Silence by McVeigh Prove Unsettling for Some*, N.Y. TIMES, June 12, 2001, at A2.

194. Based on interviews with survivors who attended the *McVeigh* trial (including those who provided VIE), Jody Madeira concluded:

[A]lthough the criminal justice system successfully held McVeigh accountable through a conviction and death sentence, it did not effectively mediate the crucial memory work needed for family members and survivors to come to terms with the bombing. These individuals were thereby left on their own to cope with McVeigh's defiant response to the horrors he had unleashed, to reconcile themselves to the unbridgeable gap between an impersonal act of terrorism and the terrifyingly personal scale of loss with which they had to cope in its aftermath

Jody Lyneé Madeira, *Ties Out of Bloodshed: Collective Memory, Cultural Trauma, and the Prosecution and Execution of Timothy McVeigh* ch. 3, pp. 11, 67 (Ind. Univ. Sch. of Law-Bloomington Legal Studies Research Paper Series, Research Paper No. 94, 2007), available at <http://ssrn.com/abstract=1005277>.

195. Wayne A. Logan, *Declaring Life at the Crossroads of Death: Victims' Anti-Death Penalty Views and Prosecutors' Charging Decisions*, 18 CRIM. JUST. ETHICS 41, 48 (1999) (noting that "there is no monolithic 'every victim'"); cf. Yael Danieli, *The Heterogeneity of Postwar Adaptation in Families of Holocaust Survivors*, in THE PSYCHOLOGICAL PERSPECTIVES OF THE HOLOCAUST AND OF ITS AFTERMATH 109, 110 (Randolph L. Braham ed., 1988) (noting the varied psychological responses of Holocaust survivors to their experiences and the attendant varied effects on their families).

196. Cf. JOANNA MATTINSON & CATRIONA MIRRLEES-BLACK, RESEARCH DEV. & STATISTICS DIRECTORATE, HOME OFFICE RESEARCH STUDIES, ATTITUDE TO CRIME AND CRIMINAL JUSTICE: FINDINGS FROM THE 1998 BRITISH CRIME SURVEY 34-44 (2000); see generally RACHEL KING, DON'T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY (2003); WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY (James R. Acker & David R. Karp eds., 2006) [hereinafter *WOUNDS THAT DO NOT BIND*] (reporting survey results showing that crime victims favored more lenient sentences than would be indicated on the basis of general opinions expressed by respondents).

ments on the propriety of capital punishment.¹⁹⁷ In short, while VIE permits a human face to infuse death penalty litigation, experience has shown that it is Janus-like.

This split in sentiment can be emotionally harmful in two chief ways: first, when opponents of capital punishment are precluded from participating as government witnesses (a common occurrence),¹⁹⁸ and second when proponents and opponents of a death sentence are pitted against one another (a rarer occurrence, highlighting the two-edged nature of the personalization sword, but successfully employed by Moussaoui's defense).¹⁹⁹ Under such circumstances, there in effect occurs a high-stakes competition of victimhood,²⁰⁰ the negative consequences of which are compounded by the intense atmospherics of mass killing prosecutions, with the media reporting with relish survivors' varied

197. Opinion poll data reflect an increasingly broad split on the propriety of the death penalty within the U.S. population as a whole. In 2005, the Gallup Organization reported that only sixty-four percent of persons surveyed favored capital punishment, down from a high of eighty percent in 1994. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, at tbl.2.51 (2006), <http://www.albany.edu/sourcebook/pdf/t2512006.pdf>. On the social and political forces giving rise to this increasing split in public sentiment, see Wayne A. Logan, *Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium*, 100 MICH. L. REV. 1336, 1336-40 (2002).

198. In *McVeigh*, for instance, the government refused to allow Marsha Kight to testify, notwithstanding that her daughter perished in the bombing, because she opposed the death penalty. See *A Constitutional Amendment Enacting a Crime Victims' Bill of Rights: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Marsha A. Kight). For other similar instances of marginalization, see Logan, *supra* note 195, at 44-45.

199. See Lewis, *supra* note 130, at A5 (noting that the defense presented twenty-four witnesses who testified of their hardships yet also of their determination to persevere). The defense was permitted to do so based on its argued need to rebut the avowed representativeness of the government's VIE witnesses, as permitted by the Federal Death Penalty Act. See Defendant Zacarias Moussaoui's Response to Government's Motion in *Limine* Regarding Defendant's Mitigation Evidence at 2, 6, United States v. Moussaoui, Crim. No. 01-455-A (E.D. Va. Apr. 4, 2006) (citing 18 U.S.C. § 3593(c) (2004)). Avoiding the obvious difficulties presented by the cross-examination of the government's VIE witnesses on the verity of their losses and the personal traits of decedents, the defense shrewdly mounted its own witnesses who also had their lives "devastated," yet had been able to "maintain their equilibrium and go on with their lives." *Id.* at 6. For additional discussion of this defense strategy, which was allowed for the first time in *Moussaoui*, see Adrienne N. Barnes, *Reverse Impact Testimony: A New and Improved Victim Impact Statement*, 14 CAP. DEF. J. 245 (2002); Richard Burr, *Expanding the Horizons of Capital Defense: Why Defense Teams Should Be Concerned About Victims and Survivors*, CHAMPION, Dec. 2006, at 44, 47.

Consistent with *Payne*'s continued prohibition of witness sentence recommendations, defense witnesses refrained from expressly stating that Moussaoui's life should be spared, but their status as defense witnesses and subtle linguistic cues allowed their anti-capital views to be readily inferred. See Timothy Dwyer & Jerry Markon, *For Victims' Families, Verdict Elicits Mix of Shock, Relief*, WASH. POST, May 4, 2006, at A16 (noting that witnesses spoke of their recovery and used terms such as "compassion" and "respect for life"). For discussion of admitted sentence opinion testimony, almost always in the form of thinly veiled pro-death sentiments offered by government VIE witnesses, and typically condoned by reviewing courts, see Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517 (2000).

200. See JOSEPH A. AMATO, VICTIMS AND VALUES: A HISTORY AND A THEORY OF SUFFERING xvii (1990) (noting that with the ascendant political status of victims "the claims of suffering confuse and divide us"); cf. Martha Minow, *Not Only for Myself: Identity, Politics and Law*, 75 OR. L. REV. 647, 650-53 (1996) (offering analysis of the question "Who can speak for whom?" in various legal contexts).

personal perspectives of whether the defendant should be put to death.²⁰¹

In addition to driving a wedge between victims, the selection process aggravates relations between victims and the entity theoretically seeking to vindicate their interests—government. With mass killings, the government necessarily must choose from among many potential witnesses. In *Moussaoui*, this pool was especially large as the government created an unprecedented database of 8000 individuals adversely affected by 9/11 and interviewed each individual who wished to speak about the impact of 9/11 on their lives.²⁰² As a result of this process, as noted earlier,²⁰³ several hundred victims expressed an interest in testifying at Moussaoui's sentencing hearing,²⁰⁴ obliging the government to ask the court to invoke a statutorily provided exception to the victims' otherwise prevailing "right to be reasonably heard at any public proceeding" concerning sentence.²⁰⁵ Pursuant to this exception, the government proposed "45 stories of victim impact," the "minimum amount of victim impact testimony necessary to convey the unprecedented level of death and injury caused,"²⁰⁶ stating:

[This] represents a reasonable sample . . . to convey properly the devastation caused on that infamous day. The representative sample includes a cross-section from each of the four flights Moreover, the representative sample includes a diversity in terms of race, religion, economic status and occupation, and also in terms of relationship to the victim (i.e., spouse, parent, sibling, child, friend, etc.). The representative sample also includes victims who were injured, representing the thousands injured during the attacks.²⁰⁷

The winnowing process of "worthy" witnesses—whether based on the aforementioned representational reasons, or physical appearance, capacity for effective communication, personal loss, or political favor of the death penalty the

201. See, e.g., *Families Divided Over Jury Finding; Moussaoui Faces Death*, ASSOCIATED PRESS, Apr. 5, 2006; Sara Rimer, *Victims Not of One Voice on Execution of McVeigh*, N.Y. TIMES, Apr. 25, 2001, at A1 (discussing ambivalent opinions among survivors preceding McVeigh's execution).

202. See "Justice for All Act" Motion, *supra* note 129, at 2.

203. See *supra* text accompanying notes 128–29.

204. See "Justice for All Act" Motion, *supra* note 129, at 2.

205. See 18 U.S.C. § 3771(a)(4), (d) (Supp. IV 2004). Under this exception, when "the number of crime victims makes it impracticable to accord" all of them the right to participate, the court "shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." *Id.* § 3771(d)(2).

206. "Justice for All Act" Motion, *supra* note 129, at 3.

207. *Id.* The government added that:

We say approximately 45 victims because some witnesses lost multiple loved ones and they will testify to impact of the loss of all of their loved ones. Thus, we expect the number of actual witnesses who testify purely about victim-impact to be less than 45. Moreover, unlike other murder cases, we intend to have only one witness testify about the impact of the loss of a single victim.

Id. at 3 n.1.

government seeks—has the obvious potential to alienate those not selected.²⁰⁸ While the undertaking itself has an avoidable political cast, the high profile nature of mass killing trials allow politics in an even purer sense to predominate. This was starkly evidenced in *Moussaoui*, where to the great dismay of some victims,²⁰⁹ Rudolph Giuliani, famous former New York City Mayor, best-selling author of a book entitled *Leadership*²¹⁰ (touting his response to 9/11), and then-future presidential candidate, was the government's first VIE witness.

Yet witness harms do not stem from the litigation process alone; trial outcomes can also be hurtful. As a result of *Payne*, capital decisions have become intensely personalized, with victims' traits and the losses associated with their killing being offered to justify death sentences. In the mass killing trials discussed, the affirmative link between VIE and death was readily apparent, with the prosecutor in *Moussaoui*, for instance, encouraging jurors to not just affirmatively find the VIE non-statutory aggravator, but to emphasize doing so with an exclamation point,²¹¹ and the prosecutor in *Al-'Owhali* telling jurors that the VIE was the "most important aggravating factor" to consider.²¹² The life-without-parole sentences ultimately imposed in these and other cases came as a personal betrayal of VIE witnesses, perversely serving to diminish, in a most public manner, the memory of victims and the enormous hardship suffered. And, given that VIE witnesses testify in a representational capacity to secure death, for dozens, hundreds, or thousands of others, a non-death outcome

208. Jody Madeira, in her interviews with victims and survivors of the Oklahoma City bombing, uncovered a related troubling phenomenon: a hierarchy of harm valuing certain harm sufferers over others, which created profound tensions among those seeking to heal. According to her research, hostility existed between families who had loved ones that perished and survivors who suffered physical or emotional injury, with the former feeling privileged and resentful toward the living. Jody Lyneé Madeira, *Ties out of Bloodshed: Collective Memory, Cultural Trauma, and the Prosecution and Execution of Timothy McVeigh* ch. 2, pp. 38–41 (Ind. Univ. Sch. of Law-Bloomington Legal Studies Research Paper Series, Research Paper No. 93, 2007), available at <http://ssrn.com/abstract=1005274>. Such tensions could naturally be triggered by the VIE witness selection process itself, adding another possible basis for re-victimization.

209. This dismay stemmed both from the fact that the ex-mayor lost no family members on 9/11 and that he allegedly pursued policies that exacerbated the harms suffered at the World Trade Centers. Among the errors highlighted by victims' families included the failure to provide adequate radios to firefighters and the decision to locate the city's emergency command control center in the Trade Center, "a known terrorist target." John Riley, *9/11 Widows Rap Rudy's Testimony*, *NEWSDAY*, Apr. 9, 2006, at A19.

One victim, who lost her husband and who played a central role in lobbying for the creation of the 9/11 Commission, offered: "I don't understand why he was invited to give a victim impact statement." . . . 'Why Mayor Giuliani? I don't think he needs closure, and he didn't lose loved ones. I think his judgments caused loved ones to be lost.'" *Id.* Another widow voiced her disfavor even more viscerally: "I wanted to vomit." . . . 'He spent 3½ hours talking about the horror of the day, but he didn't mention the things he failed to do. This is the same story he's been out giving in speeches and getting paid for . . . He should be apologizing instead of getting fees.'" *Id.*

210. RUDOLPH W. GIULIANI, *LEADERSHIP* (2005).

211. See Hirschorn, *supra* note 180.

212. See *supra* note 108 and accompanying text.

risks magnification of witness perceptions of negative self-worth.

4. Tactical Difficulties

Finally, with the greater volume of VIE witnesses and their extensive highly emotional accounts come correspondingly greater difficulties for defense counsel. As the *Payne* majority itself noted, given the high risk of offending jurors, defense counsel are naturally loath to object to or challenge VIE,²¹³ whether it relates to the personal traits of victims or the losses associated with their deaths.²¹⁴ With mass killing trials, this difficulty is, again, correspondingly increased. In *McVeigh*, for instance, fearful that repeated objections would alienate the jury, and denied a right to review VIE testimony at a preliminary hearing, the defense team lodged a continuing objection.²¹⁵ The Tenth Circuit, however, deemed the objection insufficient, relegating the lion's share of *McVeigh*'s numerous VIE-related challenges to a stringent (and ultimately unsuccessful) plain error standard of review.²¹⁶

B. THE QUESTIONABLE PLACE OF VIE IN MASS KILLING TRIALS

As the foregoing makes clear, the unique characteristics of mass killing trials create a constellation of concerns that in many ways casts in new light, if not transforms, the ongoing debate over the propriety of VIE in capital trials. However, beyond the practical and doctrinal concerns identified, fundamental reasons exist to question the role of VIE in mass killing prosecutions in principle.

First, *Payne*'s avowed need to lend a "human face" to the capital process would appear especially questionable in the context of mass killings. The graphic images of 9/11 and Oklahoma City, and the stories of human hardship suffered as a result of the killings, in particular, were omnipresent and absorbed by all Americans (indeed, much of the world) at the time.²¹⁷ If, as the *Booth* Court observed, jurors are generally aware of the toll murders take,²¹⁸ and as Justice Stevens noted in *Payne*, "[t]he fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support,"²¹⁹ mass

213. See *Payne v. Tennessee*, 501 U.S. 808, 823 (1991) (noting that "for tactical reasons it might not be prudent for the defense to rebut victim impact evidence").

214. Nor, realistically, could such losses be challenged. See *Booth v. Maryland*, 482 U.S. 496, 506 (1987) (noting that "rarely would [defendants] be able to show that the family members have exaggerated the degree of sleeplessness, depression, or emotional trauma suffered"), *overruled by Payne*, 501 U.S. 808.

215. Richard Burt, *Litigating with Victim Impact Testimony: The Serendipity That Has Come from Payne v. Tennessee*, 88 CORNELL L. REV. 517, 525-26 (2003).

216. See *United States v. McVeigh*, 153 F.3d 1166, 1218 (10th Cir. 1998).

217. See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2760 (2006) (noting that "Americans will never forget the destruction wrought by" the events of 9/11); *State v. Garza*, 163 P.3d 1006, 1019 (Ariz. 2007) (describing 9/11 as "an event universally painful for all Americans").

218. *Booth*, 482 U.S. at 508.

219. *Payne*, 501 U.S. at 866 (Stevens, J., dissenting).

killing VIE smacks of particular excess. Moreover, any professed need for heightened humanization, a prime justification of VIE, is undercut by the sensibilities of the times: Americans are ever cognizant of their common vulnerability to acts of mass violence²²⁰ and a shared sense of victimhood has assumed cultural normalcy.²²¹

Second, serious questions exist over whether *Payne's* core notion—that victim-specific harm is central to offender culpability—realistically applies to mass killings; the retributive calculus it implies simply proves too much. How can it be that anything short of the government's maximum sanction, death, is a proportionate sanction in light of the high body counts?²²² Similarly, if as Janice Nadler and Mary Rose assert, harm rightfully plays a heuristic role, providing "strong evidence of the severity of the crime,"²²³ it strains credulity to suggest that the extent of VIE employed in mass killing trials is needed to convey culpability. Indeed, there is reason to conclude that VIE, in a perverse and unintended way, exercises a mitigating influence. While intended to show the "specific harm" of murder, and not in itself cumulative (no two victims are alike and losses are diversely experienced), mass killing VIE can have a numbing effect,²²⁴ serving to diminish the desired humanizing force of VIE itself.

Third, how can it be that VIE is needed in mass killing trials to "keep the balance true"²²⁵ or to ensure that the government is not deprived of "the full

220. See Joseph Carroll, *Americans' Terrorism Worries Five Years After 9/11; Forty-five Percent of Americans Say They Are at Least Somewhat Worried About Terrorism*, GALLUP NEWS SERVICE, Sept. 11, 2006, <http://www.gallup.com/poll/24412/Americans-Terrorism-Worries-Five-Years-After0911.aspx> (finding that 45% of Americans are at least "somewhat" [] worried that they or a member of their family will become a victim of terrorism" and "half say[] a terrorist attack is likely to occur in the United States during the next several weeks" and noting that there have only been slight changes in these sentiments over the prior three years); see also MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 319 (2001) (discussing the empathic pull of "our common vulnerability to pain"); cf. Lawrence Blum, *Compassion*, in *EXPLAINING EMOTIONS* 507, 511 (Amélie Oksenberg Rorty ed., 1980) (identifying as a bond of "shared humanity" the recognition that suffering is "the kind of thing that could happen to anyone, including oneself insofar as one is a human being").

221. As David Garland has observed, today the victim is a "more representative character, whose experience is taken to be common and collective, rather than individual and atypical Publicized images of actual victims serve as the personalized, real-life, it-could-be-you metonym for a problem of security that has become a defining feature of contemporary culture." GARLAND, *supra* note 46, at 11.

222. Of course, the case can be made that death itself—and for that matter any sanction government can muster—is an insufficient response to mass killing. As Hannah Arendt wrote of Nazi atrocities, they "explode the limits of the law For these crimes, no punishment is severe enough." Letter from Hannah Arendt to Karl Jaspers (Aug. 17, 1946), in HANNAH ARENDT & KARL JASPERS, *CORRESPONDENCE, 1926–1969*, at 54 (Lotte Kohler & Hans Saner eds., Robert Kimber & Rita Kimber trans., Harcourt Brace Jovanovich, Inc. 1992) (1985); see also HANNAH ARENDT, *THE HUMAN CONDITION* 241 (2d ed. 1998) (averring that we can "neither punish nor forgive" mass killings); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 5 (1998) (asserting that the legal system is incapable of redressing such harms).

223. Nadler & Rose, *supra* note 155, at 441.

224. See HIRSCH, *supra* note 183, at 194 (noting that the massive volume of VIE in the *Al-'Owhali* trial eventually exercised a fatigue effect—victims' stories became "harder to distinguish from one another [and the] stories began to sound repetitive").

225. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

moral force” of its evidence,²²⁶ given that the defendant has been convicted of a crime resulting in the deaths of hundreds or thousands of innocents? Indeed, it is a sobering thought that American jurors (or judges) cannot, without VIE, achieve “narrative compassion”²²⁷ sufficient to understand the moral iniquity of the depraved acts.

Fourth and finally, deployment of VIE in a context so divorced from its origins can lead to a trivialization of mass killings. As Mark Drumbl has observed, “it is almost trivially true that the [9/11] attacks were criminal; they involved murder, injury, hijacking, and property destruction. But describing them this way literally denudes them of their true nature.”²²⁸ By focusing on individualized harms and victim traits, VIE serves to subjectivize mass killings,²²⁹ depriving them of their intrinsic universal character.²³⁰ Ironically, by resorting to a trapping borrowed from traditional criminal justice, in the name of distinguishing the singularity of mass killing, government may have achieved the opposite.

In sum, regardless of whether one is persuaded that VIE has a proper place in conventional capital trials, compelling reasons exist to question its use in mass killing prosecutions. In making the case for the latter, it should be noted, the discussion here has not asserted that mass killing VIE is inappropriate because it in any sense preordains the death penalty. Indeed, the government’s record when it comes to VIE patently precludes any such argument: only McVeigh got death, with each of the other defendants receiving sentences of life without parole.²³¹

While each outcome can of course possibly be attributed to idiosyncratic

226. *Id.* at 825.

227. See Yoshino, *supra* note 43, at 1886–87 (citing and discussing Elaine Scarry, *Speech Acts in Criminal Cases*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 165, 166 (Peter Brooks & Paul Gewirtz eds., 1996)).

228. Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 67 (2002).

229. See *Payne*, 501 U.S. at 823, 825 (concluding that VIE is necessary to show a victim’s “‘uniqueness as an individual human being’” and to avoid victims being made into “‘faceless stranger[s]’” (citation omitted)).

230. The 9/11 tragedy itself represents a foremost example. While surely violative of domestic criminal law, the scale of death and destruction of the events, encompassing victims from eighty-one countries, and with individuals from thirty-nine countries implicated in the attacks, qualified the attack as an atrocity of transcendent international consequence. See MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 4, 132 (2007); cf. KENNETH J. CAMPBELL, *GENOCIDE AND THE GLOBAL VILLAGE* 28 (2001) (quoting U.N. Secretary General Kofi Annan to the effect that “the crime of genocide against one people truly is an assault on us all”).

231. It bears mention that the evidence on the dispositive influence of VIE in conventional capital trials remains unclear. See Trina M. Gordon & Stanley L. Brodsky, *The Influence of Victim Impact Statements on Sentencing in Capital Cases*, 7 J. FORENSIC PSYCHOL. PRAC. 45, 50 (2007) (finding in an experiment that only thirty-three percent of the sample subjects found VIE to be “moderately influential”); Wayne A. Logan, *Victims, Survivors, and the Decisions to Seek and Impose Death*, in *WOUNDS THAT DO NOT BIND*, *supra* note 196, at 161, 173 (citing and discussing studies done to date).

factors such as the particular jurors impaneled²³² and any number of distinct features of the respective defendants and trials,²³³ there is no escaping that VIE did not compel jurors to automatically impose death. In *Nichols*, jurors failed to reach the VIE issue because they could not reach unanimity on whether Nichols intended to kill,²³⁴ a threshold statutory requirement.²³⁵ In *Moussaoui*, jurors unanimously found an extensive array of specific forms of VIE relating to victims' personal characteristics; emotional, psychological, and physical harm; as well as adverse consequences to the U.S. government and New York City; yet did not impose death.²³⁶ Perhaps most significant, in *Al-'Owhali* nine jurors expressly found that executing the defendant "may not necessarily alleviate the victims' or the victims' families' suffering."²³⁷

Given the government's unimpressive record with VIE, question naturally arises over why it has continued to figure so centrally in mass killing trials. As discussed next, the answer in significant part lies in an array of social and political benefits extending well beyond the immediate targets of prosecution.

IV. DIDACTICISM AND DISCOURSE: THE INSTRUMENTALITY OF VIE

Criminal trials have always served a variety of critically important purposes. Most obviously, they signify the sovereign's capacity to impose its authority over law-breakers, backed by threatened deprivations of life or liberty.²³⁸ Yet

232. See, e.g., James Brooke, *Nichols's Life Was Saved by a Handful of Holdouts*, N.Y. TIMES, Jan. 11, 1998, at 14 (noting that the foreperson in Nichols's trial, a natural childbirth instructor, described herself as a "student of life" during jury selection and burst into tears when asked about the death penalty).

233. In *Nichols* and *Moussaoui*, in particular, jurors were evidently concerned that the defendants lacked direct participation in the mass killings with which they were charged. See *id.* (discussing juror sentiment in *Nichols*); John Riley, *Moussaoui 9/11 Verdict; Jury Spares Life of Conspirator*, NEWSDAY (N.Y.), May 4, 2006, at A3 (discussing juror sentiment in *Moussaoui*). In *Nichols*, the foreperson asserted publicly after the trial that the government "dropped the ball" in not apprehending other potential suspects in the bombing. See Brooke, *supra* note 232, at 14. In both *Moussaoui* and *Al-'Owhali*, the possibility of a "terrorist's veto" loomed—that sentencing the ideologically driven terrorists to death would provide the "martyr's death" they desired, at the hands of the despised U.S. government no less. In *Moussaoui*, all jurors expressly rejected as a mitigating factor that the defendant would be martyred with a death sentence. See Riley, *supra*; Special Verdict Form, *supra* note 181, at 7. In *Al-'Owhali*, on the other hand, ten of twelve jurors concluded the opposite. Benjamin Weiser, *Life for Terrorist in Embassy Attack*, N.Y. TIMES, June 13, 2001 at A1.

234. See Brooke, *supra* note 232 (quoting a juror in a post-sentencing interview as saying, "Terry Nichols wasn't directly present or implicated with anything").

235. 18 U.S.C. § 3591(a)(2) (2000).

236. See generally Special Verdict Form, *supra* note 181.

237. See Weiser, *supra* note 233, at A1. This juror information likely affected the litigation strategy in the subsequent sentencing hearing of Khalfan Mohammed, convicted of bombing the U.S. Embassy in Tanzania in 1998. With Khalfan, the government focused instead on the capital aggravating factor of future dangerousness, based on the defendant's alleged brutal attack on a prison guard while awaiting trial, which resulted in brain damage to the guard. Ultimately, the jury deadlocked and Khalfan also received a life-without-parole sentence. See Benjamin Weiser, *Jury Rejects Death Penalty for Terrorist*, N.Y. TIMES, July 11, 2001, at B1.

238. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 47–48 (Alan Sheridan trans., Vintage Books ed. 1979) (1977) ("Besides its immediate victim, the crime attacks the sovereign;

criminal trials also fulfill a crucial dramaturgic function, serving as prime instances of “performing the laws”—allowing matters of common public concern to be enunciated and deliberated before the populace.²³⁹ This function assumes foremost significance in mass killing prosecutions, and VIE plays a unique role in the political theater that they embody.

In modern times, the phenomenon was most vividly first evidenced in the Allies’ landmark 1945–1946 prosecution of Nazis for atrocities committed during World War II.²⁴⁰ The trials (officially called the International Military Tribunal), held in Nuremberg, Germany, at once sought to hold defendants to account and create a historical record—in Chief Prosecutor Robert R. Jackson’s words, to “establish incredible events by credible evidence.”²⁴¹ Didacticism has played a similarly central role in subsequent mass killing prosecutions, including Israel’s trial of Nazi Adolf Eichmann in 1961,²⁴² and more recently, the International Criminal Tribunals in Rwanda and the former Yugoslavia.²⁴³

The U.S. domestic mass killing prosecutions examined earlier were also motivated by a desire to create an enduring public record, and the government looked to VIE as a prime means to achieve this end. As the lead prosecutor in *Moussaoui* told the jury, the VIE afforded an “opportunity to tell a very important story,”²⁴⁴ the significance of which should be emphasized by an exclamation point on the verdict form.²⁴⁵ The *Moussaoui* trial, however, highlighted the much broader didactic function and utility of VIE. More than historicizing and chronicling the events of 9/11, the VIE in *Moussaoui* showcased its unique instrumental benefits, for government and victims alike.

it attacks him personally, since the law represents the will of the sovereign: it attacks him physically, since the force of the law is the force of the prince.”).

239. See Robert Hariman, *Performing the Laws: Popular Trials and Social Knowledge*, in POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW 17–18 (Robert Hariman ed., 1990); see also Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 385 (“The criminal trial is a ‘miracle play’ of government in which we can carry out our inarticulate beliefs about crime and criminals within the reassuring formal structure of disinterested due process.”).

240. In the first trials, conducted 1945–1946, targeting several of the most notorious Nazis, the tribunal indicted twenty-four individuals, tried twenty-two (one committed suicide and another was declared mentally incompetent), convicted nineteen (twelve were sentenced to death), and acquitted three. See TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW No. 10, app. at 241 (photo. reprint 1997) (1949).

241. Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals (June 7, 1945), in 39 AM. J. INT’L L. 178, 184 (SUPP. 1945). On the didactic utility of trials in the wake of mass killings more generally, see MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 1–10 (1997).

242. ARENDT, *supra* note 12, at 19 (“For it was history that, as far as the prosecution was concerned, stood in the center of the trial.”).

243. See, e.g., Molly Moore, *Trial of Milosevic Holds Lessons for Iraqi Prosecutors*, WASH. POST, Oct. 18, 2005, at A19.

244. See Jerry Markon et al., *Moussaoui Formally Sentenced to Life in Prison*, WASH. POST, May 4, 2006, at A12.

245. Hirschhorn, *supra* note 180.

A. BENEFITS FOR GOVERNMENT

For the U.S. government, the tragic events of 9/11 remain a source of controversy and defensiveness. The bipartisan commission assembled to investigate whether the human and physical harm sustained in New York, Pennsylvania, and Virginia could have been prevented met with significant Executive Branch resistance,²⁴⁶ and the Commission ultimately highlighted numerous governmental failures.²⁴⁷ To the minds of some, the United States blundered in failing to collect sufficient intelligence, make effective use of what it had, and/or failed to regard the possibility of an attack with sufficient seriousness.²⁴⁸ Meanwhile, conspiracy theorists, including a group of fifty professors calling themselves "Scholars for 9/11 Truth"²⁴⁹ and media interests in the Arab-Muslim world,²⁵⁰ have questioned whether perhaps the U.S. government was somehow complicit.²⁵¹ In turn, the perception of governmental misfeasance or nonfeasance has been fueled, ironically, by the 9/11 Victim Compensation Fund, a massive federally funded administrative mechanism that has provided "extraordinarily generous" payments to decedents' survivors and persons injured by the attacks,²⁵² permitting parallels to be drawn to prior instances of U.S. largesse in the face of its alleged failure to protect civilian populations.²⁵³

In this context, the government's deployment of VIE in the capital prosecution of Moussaoui in the U.S. District Court for the Eastern District of Virginia

246. The Bush Administration opposed formation of the commission and acceded only after 9/11 victims and survivors signaled that they were prepared to press their case in the media. See Jim Dwyer, *Families Forced a Rare Look at Government Secrecy*, N.Y. TIMES, July 22, 2004, at A18. On the administration's resistance to the Commission more generally, see THOMAS H. KEAN & LEE H. HAMILTON, *WITHOUT PRECEDENT: THE INSIDE STORY OF THE 9/11 COMMISSION* 16–22 (2006).

247. See 9/11 COMMISSION REPORT, *supra* note 119, at xvi.

248. See, e.g., Dan Eggen & Bill Miller, *Bush Was Told of Hijacking Dangers*, WASH. POST, May 16, 2002, at A01.

249. See John Gravois, *Professors of Paranoia? Academics Give a Scholarly Stamp to 9/11 Conspiracy Theories*, CHRON. OF HIGHER EDUC., June 23, 2006, at A10.

250. See, e.g., Gregory Katz, *Arab Press Explores Other Theories in Attacks*, DALLAS MORNING NEWS, Nov. 18, 2001, at 17A; Warren Richey, *Muslim Opinion Sees Conspiracy*, CHRISTIAN SCI. MONITOR, Nov. 6, 2001, at 1.

251. More than a third of Americans surveyed in summer 2006 opined that the federal government either took part in or permitted the attacks to happen. Jim Dwyer, *U.S. Counters 9/11 Theories of Conspiracy*, N.Y. TIMES, Sept. 2, 2006, at B1. In response, the U.S. government has inaugurated a web site intended to rebut many of the chief conspiracy theories. See The Top September 11 Conspiracy Theories, <http://usinfo.state.gov/xarchives/display.html?p=pubs-english&y=2006&m=August&x=20060828133846esnamfuaK0.2676355> (last visited Feb. 4, 2008).

252. Kenneth S. Abraham & Kyle D. Logue, *The Genie and the Bottle: Collateral Sources Under the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 591, 592 (2003). Ultimately, the fund distributed just under \$6 billion in survivor claims for 2880 decedents. KENNETH R. FEINBERG, *WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* 193 (2005). It also distributed more than \$1 billion to 2680 injured victims. *Id.* The average award for deceased victims was \$2.1 million, and awards to those suffering personal injuries ranged between \$500 and \$8.6 million. *Id.* at 202.

253. See Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 290 (2003) (drawing parallels between the government's compensation of victims of the War of 1812 and 9/11).

provided a prime opportunity to recalibrate the critical discourse surrounding the events of 9/11: to shift from being a target of possible blame and suspicion to being a sufferer of bellicose terrorist savagery.²⁵⁴ As the U.S. government opened its coffers to individuals victimized by 9/11,²⁵⁵ it opened its courts to their stories, and in the process benefited from the patina of their victimhood.²⁵⁶ As important, the trial allowed the United States to lay out in extensive detail the ways in which the federal government itself was victimized that day, asking jurors to expressly find so on the capital verdict form (which they did),²⁵⁷ permitting it to “frame” the events of 9/11²⁵⁸ consistent with its broader war on terror.²⁵⁹

B. BENEFITS FOR VICTIMS

For victims, VIE afforded similar instrumental benefits. First, it provided a chance for a fuller depiction of the harms wrought on 9/11, allowing for augmentation of the 9/11 Commission Report²⁶⁰ and a public airing of the tragic personal consequences beyond the bureaucratic confines of the 9/11 Victim Compensation Fund.²⁶¹ The trial also allowed for discovery of sorts, prompting

254. For an argument that the victims' rights movement more generally has not been driven by a desire to benefit victims, but rather constitutes a cynical effort by government to commandeer highly attractive victim imagery and rhetoric to benefit its own tough-on-crime goals, see Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 750, 769–74 (2007).

255. See David W. Chen, *After Weighing Value of Lives, 9/11 Fund Completes Its Task*, N.Y. TIMES, June 16, 2004, at A1 (reporting that more than five thousand families received compensation from the U.S. government).

256. See, e.g., Phil Hirschhorn, *Jury: Moussaoui Is Eligible for Death*, CNN.com, Apr. 5, 2006, <http://www.cnn.com/2006/LAW/04/03/moussaoui.verdict/index.html> (quoting Justice Department spokesperson as the Moussaoui trial entered the sentencing phase that “[o]ur efforts on behalf of the victims of 9/11 will continue as we pursue the next phase of this trial”). VIE held broader instrumental (political) benefit for the defense as well. In the words of defense counsel, the “reverse” VIE witnesses mounted by the defense “testified as citizens of a free nation, uncowed by terrorism. None of them testified for Moussaoui.” Jerry Markon & Timothy Dwyer, *Jurors Reject Death Penalty for Moussaoui*, WASH. POST, May 6, 2006, at A01.

257. See *supra* note 181 and accompanying text.

258. See generally ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974) (describing how events can be “framed” so as to encourage certain interpretations and discourage others). New York City also experienced public history benefit, because it too was sullied over subsequent charges of ill-preparedness. However, inasmuch as the U.S. government conducted the prosecution, attention here is dedicated to the didactic role that VIE played vis-à-vis it.

259. As President Bush remarked on the anniversary of 9/11, the events launched a “great struggle that tests our strength, and even more our resolve,” with a new mission to “rid the world of terror.” President’s Remarks to the Nation at Ellis Island (Sept. 11, 2002), <http://www.whitehouse.gov/news/releases/2002/09/20020911-3.html>; see also Lewis, *supra* note 130, at A1 (quoting President Bush: “The end of this trial represents the end of [the Moussaoui case] but not an end to the fight against terror”).

260. See Hirschhorn, *supra* note 256 (quoting wife of victim from Pentagon bombing that “[i]t was important to all the family members that [the trial] go onto the next phase so the impact statements are heard”).

261. On the central role played by victims in the creation of the 9/11 Commission Report itself, see Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1451–55 (2005).

previously unavailable aspects of 9/11 to be publicly aired (for example, the airplane cockpit voice recordings of the doomed Pennsylvania flight), driving home again the acts of heroism evident that day.²⁶²

Critically important, moreover, VIE allowed 9/11 victims to reassert their victimhood, which had experienced a negative status transformation. Having prevailed in Congress with passage of the Victim Compensation Fund, distinct both for its unprecedented largesse and the fact that other recent terrorist acts (for example, Oklahoma City) did not garner a federal compensatory response,²⁶³ those most directly affected by 9/11 metamorphosed from victims to recipients; they were, as noted by Michele Dauber, borrowing from the work of Erving Goffman, "soiled."²⁶⁴ Amid public accusations of money grubbing and excessive awards,²⁶⁵ and disputes among themselves over the relative amounts bestowed,²⁶⁶ the beneficiaries of the fund (ninety-seven percent of 9/11 victims)²⁶⁷ were "transformed from virtuous to grasping, from deserving of charity to worthy of suspicion."²⁶⁸

The extensive VIE provided during Moussaoui's sentencing proceeding—gripping, highly emotional testimony and exhibits—refocused public attention away from this unseemly condition and status, allowing for what Henry Louis Gates has called a "counternarrative."²⁶⁹ Moreover, to the extent that 9/11 victims insisted that monetary compensation did not bring "closure," but only financial assistance,²⁷⁰ public airing of their losses reminded fellow Americans of their unfulfilled emotional needs, for which VIE held promise but from which only a small fraction of harm-sufferers were able to benefit.²⁷¹

In sum, with mass killing prosecutions, VIE affords an array of potential benefits to government and victims alike. These benefits, however, are not the most obvious ones. While VIE is touted as beneficial for strategic litigation advantage in the effort to secure a death sentence and as therapeutic succor for those taking the stand, evidence in support of the former is manifestly not in the

262. Greg Gordon, *Mayhem of Flight 93 Replayed for Jury*, STAR TRIB. (Minneapolis), Apr. 13, 2006, at 1A.

263. See Bill Marsh, *Putting a Price on the Priceless: One Life*, N.Y. TIMES, Sept. 9, 2007, at 44.

264. Dauber, *supra* note 253, at 291, 348 (citing and discussing ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963)).

265. See, e.g., Lisa Belkin, *Just Money*, N.Y. TIMES MAG., Dec. 8, 2002, at 92.

266. See, e.g., David W. Chen, *Lure of Millions Fuels 9/11 Families' Feuding*, N.Y. TIMES, June 17, 2002, at A1.

267. FEINBERG, *supra* note 252, at 114.

268. Dauber, *supra* note 253, at 348.

269. HENRY LOUIS GATES, JR., *THIRTEEN WAYS OF LOOKING AT A BLACK MAN* 106–07 (1997) ("Counternarratives are . . . the means by which groups contest [the] dominant reality and the fretwork of assumptions that supports it.").

270. FEINBERG, *supra* note 252, at 161. Fewer than ninety individuals opted out of the fund and filed private tort suits. *Id.* at 164–65. Approximately seven eligible families of decedents failed to seek recovery altogether. *Id.* at 161.

271. As discussed above, whether this need was met remains an open and individualized question. See *supra* notes 187–94 and accompanying text.

record,²⁷² and evidence for the latter remains in doubt.²⁷³ Moreover, as discussed, compelling practical and principled reasons exist to question use of VIE in mass killing prosecutions.²⁷⁴ Nevertheless, equally compelling social and political reasons make it very likely that U.S. mass killing prosecutions will continue to be dominated by VIE.

V. POTENTIAL INTERNATIONAL APPLICATIONS OF VIE

As any casual reading of the daily paper will immediately reveal, Americans are not the sole target of those bent on inflicting mass casualties on innocent civilian populations. Large-scale murderous acts afflict the world at-large to an even greater extent, and the international community is struggling over how to best redress such atrocities. Given this reality, the question arises whether the hydraulic social and political forces driving use of VIE in U.S. mass killing prosecutions potentially will, and should, have similar influence in the international criminal justice arena.

Today, the victims' rights movement is exercising increasing world-wide influence. In the multinational context, the United Nations specifies an array of victims' rights in its *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.²⁷⁵ And, in what George Fletcher has characterized as "nothing less than a major victory for the victims' rights movement,"²⁷⁶ the Rome Statute governing the International Criminal Court (ICC)—reflecting the influence of the *partie civile* approach dominant in continental Europe²⁷⁷—prescribes numerous victim participatory rights.²⁷⁸ Moreover, while not yet expressly condoning admission of victim trait evidence, the International Criminal Tribunal for the Former Yugoslavia (ICTY)²⁷⁹

272. See *supra* note 231 and accompanying text.

273. See *supra* notes 187–212 and accompanying text.

274. See *supra* notes 217–37 and accompanying text.

275. The Declaration provides that victims should have "access to the mechanisms of justice and to prompt redress . . . for the harm they have suffered" and that the "views and concerns of victims [should] be presented and considered at appropriate stages of the proceedings." Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex ¶¶ 4, 6(b), U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/40/53 (Nov. 29, 1985).

276. George P. Fletcher, *Justice and Fairness in the Protection of Crime Victims*, 9 LEWIS & CLARK L. REV. 547, 554 (2005).

277. Gerard J. Mekjian & Matthew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceedings of the International Criminal Court*, 17 PACE INT'L L. REV. 1, 16–17 (2005) ("Civilist legal systems [] allow a victim to act as *partie civile* [where] a victim is afforded the capacity to directly through their counsels, or indirectly, through the prosecution, present evidence in a criminal proceeding which the victim deems necessary for the subsequent pursuit of damages in civil proceedings.").

278. See generally *id.* Victims figure centrally in ad hoc tribunals as well. See generally, e.g., David Boyle, *The Rights of Victims: Participation, Representation, Protection, Reparation*, 4 J. INT'L CRIM. JUST. 307 (2006) (discussing the significant role of victims in the Cambodian Extraordinary Chambers, based on Cambodian law with its *partie civile* orientation).

279. For a comprehensive summary of case law rendered by the ICTY, with particular focus on such testimony, see HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A TOPICAL

and the ICC²⁸⁰ both allow for victim harms to be considered in assessing punishment.

While significant, these steps have nonetheless been uneven and tentative. In the ICC context, for instance, core legal concepts—such as whether “victim” status also encompasses third parties suffering indirect harm—have yet to be clarified.²⁸¹ Moreover, the ICC makes victim input a matter of discretion for the court and emphasizes that such input “will in most cases take place through a legal representative and will be conducted in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.”²⁸²

A. PROSPECTS FOR MIGRATION

Despite this tentativeness, and despite the ongoing pressure to limit criminal tribunal proceedings due to their cost and extended duration,²⁸³ the distinct possibility exists that VIE will migrate into the international arena in coming years. This is so for several reasons. First and foremost, as in the United States, affording victims a direct role in the prosecution and punishment of their oppressors enjoys enormous social, political, and (some would assert) moral appeal.²⁸⁴ This appeal is amplified in the context of mass killings, given their grave harms and exponentially greater number of victims.²⁸⁵

A second reason supporting the migration of VIE stems from the doctrinal void presently characterizing international criminal law. As Mark Drumbl recently observed, “the international community is prosecuting crimes of mass

DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 554–55, 562–64, 605–06 (2006).

280. See I.C.C. R.P. & EVID. 145(1)(c), available at http://www.icc-cpi.int/library/about/officialjournal/Rules_of_procedure_and_Evidence_English.pdf (specifying that “the harm caused to victims and their families” is to be considered in determining sentences).

281. See Carsten Stahn et al., *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT’L CRIM. JUST. 219, 231–33 (2006) (noting this lack of clarification and urging a broad definition that encompasses both direct and indirect victims, based on ICC Rules).

282. See Int’l Criminal Court, Victims and Witnesses, <http://www.icc-cpi.int/victimissues.html> (last visited Oct. 16, 2007) (quotation marks omitted).

283. See Nancy Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, 59 VAND. L. REV. 69, 84–86 (2006) (noting severe budgetary pressures on tribunals); Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 249, 299 (2007) (noting lengthy duration of trials before the Rwandan and Yugoslavian International Criminal Tribunals).

284. See, e.g., Stahn et al., *supra* note 281, at 221 (“On a moral level, the participation of victims will ensure that the Court, and the international community at large, are made fully aware of the suffering endured by victims.”).

285. This is so regardless of whether the death penalty looms as potential punishment. In the United States, of course, federal law permits the death penalty, which was sought in each of the prosecutions surveyed above. While international tribunals do not now permit capital punishment, domestic criminal law in several countries in which mass killings have occurred does permit the sanction, and capital prosecutions have ensued in those countries. See Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 AM. J. INT’L L. 747, 755–56 (2005) (discussing the availability of the death penalty in Rwanda, the former Yugoslavia, and Iraq). When death is a possible sanction, the personal stakes for defendants are higher, but the systemic and juristic ramifications discussed here pertain even when a lesser sanction looms.

violence without first having developed a thorough criminology of mass violence, penology for perpetrators, or a victimology for those aggrieved.”²⁸⁶ Sentencing, in particular, however, has of late deservedly received increased attention,²⁸⁷ complemented by calls for more reasoned analysis in support of sentences²⁸⁸ and distinct sentencing proceedings like those used in the United States,²⁸⁹ the system that inspired *Payne*. Indicative of this increased formalization, tribunals have identified and relied upon aggravating and mitigating circumstances (including VIE-like considerations) for consideration in reaching outcomes.²⁹⁰ As this transformation continues, the increasing tendency of international tribunals to attach cardinal importance to the “gravity” of an offense,²⁹¹ as the *Payne* majority did in 1991, makes the migration all the more likely.

B. BACK TO THE FUTURE: NUREMBERG, EICHMANN, AND MODERN DAY ATROCITIES

In setting the contours for any discussion of the propriety of such a migration, one cannot avoid the foundational legacy afforded by the prosecution of Nazis in the wake of World War II, events that continue to exercise singular influence on legal internationalism.²⁹² Indeed, the Nuremberg trials of 1945 mounted by the Allies,²⁹³ and the prosecution of Adolf Eichmann by the Israeli government in 1961,²⁹⁴ although historically unique, helpfully serve to frame and illuminate the competing legal visions that should inform any such debate.

286. Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 576 (2005); see also Alison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Sentencing*, 87 VA. L. REV. 415, 434 & n.81 (2001) (noting historical inattention in international fora to sentencing principles and goals in particular).

287. See, e.g., Robert D. Sloane, *Sentencing for the “Crime of Crimes”: The Evolving “Common Law” of Sentencing of the International Criminal Tribunal for Rwanda*, 5 J. INT’L CRIM. JUST. 713 (2007) (discussing the development of “common law”-style sentencing guidelines for the crime of genocide).

288. See, e.g., Danner, *supra* note 286, at 418, 434.

289. See generally, e.g., Stuart Beresford, *Unshackling the Paper Tiger—The Sentencing Practices of the Ad Hoc Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1 INT’L CRIM. L. REV. 33 (2001).

290. See *supra* notes 278–80 and accompanying text.

291. See, e.g., Rome Statute of the International Criminal Court art. 78, §1, July 17, 1998, 2187 U.N.T.S. 90, available at <http://www.un.org/law/icc/statute/romeofra.htm>; Prosecutor v. Stakic, Case No. IT-97-24-A, Judgment, ¶ 357 (Mar. 22, 2006); Prosecutor v. Krstic, Case No. IT-98-33, Judgment, ¶¶ 698–703 (Aug. 2, 2001). See generally Andrea Carcano, *Sentencing and the Gravity of the Offense in the International Criminal Court*, 51 INT’L & COMP. L.Q. 583 (2000); Ralph Henham, *Developing Contextualized Rationales for Sentencing in International Criminal Trials*, 5 J. INT’L CRIM. JUST. 757, 759 (2007); Ray Murphy, *Gravity Issues and the International Criminal Court*, 17 CRIM. L.F. 281 (2006).

292. See Richard Overy, *The Nuremberg Trials: International Law in the Making*, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 2, 28–29 (Phillipe Sands ed., 2003) (noting critical influence of Nuremberg for contemporary international criminal justice); Alan A. Ryan, *Nuremberg’s Contributions to International Law*, 30 B.C. INT’L & COMP. L. REV. 55 (2007) (same).

293. For examples of the expansive Nuremberg historiography see generally, for example, DONALD BLOXHAM, *GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY* (2001), and ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIALS* (2003).

294. Eichmann, who oversaw the transport of Jews to concentration camps, was captured in Argentina by Israeli intelligence agents and tried in a capital proceeding shortly thereafter in Israel by a

The proceedings at Nuremberg, occurring while Europe was still reeling from the unprecedented carnage and savagery of the war, were driven by the Allies' intense desire to impress upon the emerging new world order the virtue of their cause.²⁹⁵ This foremost goal influenced the tactical approach taken by the prosecution, motivating it to establish Nazi atrocities first and foremost by means of documentation, rather than live witnesses.²⁹⁶ Chief Prosecutor Robert Jackson, writing several years after the trials, recounted the pivotal choice made:

The prosecution early was confronted with two vital decisions One was whether chiefly to rely upon living witnesses or upon documents for proof of our case. The decision . . . was to use and rest on documentary evidence to prove every point possible The documents could not be accused of partiality, forgetfulness, or invention, and would make the sounder foundation, not only for the immediate guidance of the Tribunal, but for the ultimate verdict of history.²⁹⁷

In *Eichmann*, on the other hand, victims and their plight played a self-consciously central role. Chief Prosecutor Gideon Hausner, Israel's Attorney General, accentuated this role at the outset of the trial, when he stated in opening argument:

As I stand here before you, Judges of Israel, to lead the prosecution of Adolf Eichmann, I do not stand alone. With me, in this place and at this hour, stand six million accusers. But they cannot rise to their feet and point an accusing finger toward the man who sits in the glass dock and cry: "I accuse." For their ashes were piled up in the hills of Auschwitz and in the fields of Treblinka Their blood cries out, but their voices are not heard.²⁹⁸

In the ensuing proceedings, conducted in a municipal auditorium in Jerusalem remodeled for the trial, one hundred witnesses provided dramatic accounts

three-judge panel. See generally Zvi Aharoni & Wilhelm Dietl, *Operation Eichmann: The Truth About the Pursuit, Capture and Trial* (1997).

295. See Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* 24 (2000) (noting U.S. efforts to foster extension of procedural rights in prosecutions of Nazi defendants); Peter Maguire, *Law and War: An American Story* 91 (2001) (observing that U.S. Secretary of War Henry Stimson argued for a tribunal such as Nuremberg because it would provide a public chronicle and highlight to the world the differences between the defeated fascist and totalitarian regimes and the democratic values of the Allies).

296. Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* 12 (2001) (noting that roughly 4000 German documents and 1800 still photos were entered as exhibits).

297. Robert H. Jackson, *Introduction* to Whitney R. Harris, *Tyranny on Trial* xxix, xxxv-xxxvi (1954); see also Telford Taylor, *The Nuremberg War Crimes Trials*, 27 *INT'L CONCILIATION* 243, 262 (1949) (noting that "the judicial foundations of the trial were strengthened" by its emotionally unadorned legalism).

298. Gideon Hausner, *Justice in Jerusalem* 323-24 (1966).

of their plight and that of their deceased loved ones.²⁹⁹ Hausner subsequently wrote that the prosecution was grateful for the “documentation sessions,”³⁰⁰ yet that the “narratives were so overwhelming, so shocking, that we almost stopped observing the witnesses and their individual mannerisms.”³⁰¹

It was often excruciating merely to listen to one of these tales. Sometimes we felt as if our reactions were paralyzed, and we were benumbed. It was a story with an unending climax. Often I heard loud sobbing behind me in the courtroom. Sometimes there was a commotion, when the ushers removed a listener who had fainted. Newspaper reporters would rush out after an hour or two, explaining that they could not take it without a pause.³⁰²

The prosecution’s *modus operandi*, in turn, was geared toward achieving maximum victim-centeredness and pathos. Hausner’s prosecution team, like the U.S. prosecutors in *Moussaoui*,³⁰³ undertook a massive effort to identify potential witnesses, and hand-picked from the hundreds of applicants those who ultimately testified.³⁰⁴ Likewise, as in *Moussaoui* where Mayor Giuliani was designated as the first VIE witness to testify, the Israeli government selected witnesses of public prominence to convey the victim narrative, as well as individuals capable of telling a “good story.”³⁰⁵ Hausner, like his U.S. prosecutorial counterparts, urged the court to “remember the faces and the reactions of those survivors who testified here.”³⁰⁶

In sum, while both the Nuremberg and *Eichmann* trials sought to chronicle the horrors of Nazism, they went about doing so in very different ways. Whereas in Nuremberg government officials steadfastly focused on the aggressive war-making of the defendants, largely divorced from their individualized human effects,³⁰⁷ and the didactic idiom was documentary,³⁰⁸ in *Eichmann* the

299. See ARENDT, *supra* note 12, at 223.

300. HAUSNER, *supra* note 298, at 331.

301. *Id.* at 327.

302. *Id.* at 331; see also *id.* at 291 (noting that, in contrast to the Nuremberg tribunal, the testimony at Eichmann’s trial was intended to “reach the hearts of men”); TOM SEGEV, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST* 337–39 (1993) (noting that the witness testimonials, unlike the documents at Nuremberg, were intended by Hausner to “shock the heart”).

303. See *supra* notes 202–05 and accompanying text.

304. See ARENDT, *supra* note 12, at 223; HAUSNER, *supra* note 298, at 292–97.

305. See Hanna Yablonka, *Preparing the Eichmann Trial: Who Really Did the Job?*, 1 THEORETICAL INQUIRIES L. 369, 379–83 (2000). On the political cast of such prosecutions more generally see Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, 55 INT’L ORG. 655 (2001).

306. DOUGLAS, *supra* note 296, at 176. Likewise, as in the U.S. trials surveyed, Eichmann’s counsel studiously refrained from cross-examining any victim-witnesses, “out of respect and reverence for their suffering.” *Id.* at 129.

307. *Id.* at 93–94 (observing that the primary evidentiary emphasis at trial was on Nazis’ aggressive war-making, not the plight of victims).

308. *Id.* at 104 (noting that the Nuremberg trial strategy was largely “documentary—conceived either as filmic, material, or written artifact”).

prosecution focused squarely and unremittingly on the plight of victims. Rather than eschewing pathos and victim-centeredness out of concern that the legal integrity of the forum would be subverted and hence subject to dispute, a prime concern in Nuremberg, *Eichmann* immersed itself in it.³⁰⁹ As noted by Shoshana Felman, "[w]hereas the Nuremberg trials view murderous political regimes and their aggressive warfare as the center of the trial . . . , the Eichmann trial views the victims as the center of what gives history its monumental dimensions and what endows the trial with its monumental significance."³¹⁰

The tenor and content of the *Eichmann* prosecution inspired pointed criticism from Hannah Arendt who covered the trial for the *New Yorker* magazine,³¹¹ and famously coined the term "banality of evil" in her book on the proceedings.³¹² To her, the trial amounted to an improper invasion of the public by the private, diminishing the juridical stature of the enterprise.³¹³ Writing in terms evocative of criticisms leveled against VIE today, Arendt wrote:

For just as a murderer is prosecuted because he has violated the law of the community, and not because he has deprived the Smith family of its husband, father and breadwinner, so these modern, state-employed murderers must be prosecuted because they violated the order of mankind, and not because they killed millions of people.³¹⁴

Likewise, she condemned what she saw as the over-the-top historicism of the trial, obviated by the reality (similar to the U.S. domestic trials discussed earlier) that the audience "was filled with 'survivors,' . . . immigrants from Europe, like myself, who knew by heart all there was to know."³¹⁵ To Arendt, the prosecution's case was objectionable because it "was built on what the Jews had suffered, not on what Eichmann had done."³¹⁶ The trial, she wrote, "degen-

309. Chief Prosecutor Hausner insisted that the use of live witnesses would convey the human harm in a fashion that "incomprehensible statistics" could not. HAUSNER, *supra* note 298, at 291–92; *see also* DOUGLAS, *supra* note 296, at 106–09 (describing emotional nature of *Eichmann* proceedings).

310. Shoshana Felman, *Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust*, 1 THEORETICAL INQUIRIES L. 465, 479 (2000).

311. The *New Yorker* website has abstracts of all five of Hannah Arendt's *New Yorker* articles between February and March of 1963. *See, e.g.*, Hannah Arendt, *V-Eichmann in Jerusalem*, NEW YORKER, Mar. 16, 1963, at 58, available at http://www.newyorker.com/archive/1963/03/16/1963_03_16_058_TNY_CARDS_000272118 (abstract only).

312. ARENDT, *supra* note 12.

313. *See id.* at 253 ("The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes . . . can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.").

314. *Id.* at 272; *cf.* *Booth v. Maryland*, 482 U.S. 496, 505–07 (1987) (condemning VIE because it distracts the sentencing authority from the character of the defendant and the circumstances of the crime, the traditional retributive bases of the death penalty inquiry).

315. ARENDT, *supra* note 12, at 8. In addition to the courtroom, *Eichmann* was witnessed by a television audience, which in Israel, at least, was acutely aware of the savagery of the Nazi regime. JEFFREY SHANDLER, *WHILE AMERICA WATCHES: TELEVISIONING THE HOLOCAUST* (1999).

316. *See* ARENDT, *supra* note 12, at 6.

erate[d] into a bloody show," wherein "witness followed witness and horror was piled upon horror."³¹⁷

To others, however, such as Professor Shoshana Felman, it is precisely this intensely personalized quality that enables the chronicling of mass killing to be part of, in Nietzsche's terms, "monumental history."³¹⁸ *Eichmann* amounted to a "revolutionary transformation of the victim that ma[de] the victim's story happen for the first time" and permitted "a legal act of authorship of history."³¹⁹ While Nuremberg created enduring legal precedent, for the first time holding individuals accountable for crimes against humanity,³²⁰ its "legal narrative[] did not suffice, since it did not articulate the victims' story, but subsumed it in the general and political and military story of the War."³²¹ *Eichmann's* prosecution was transformative, Felman contends, not so much for its advancement of victims' rights, but rather because it allowed for "victims' (legal and historical) authority."³²² *Eichmann*, in short, for the first time allowed conveyance of a "'monumental history' not of the victors but of the victims,"³²³ endowing the dramatic with legal meaning and vice versa.³²⁴

C. THE PERILS OF VICTIM-CENTEREDNESS

Whether lending a human face to atrocity diminishes the gravity and quality of legal proceedings intended to redress mass killings remains a central question for international criminal justice. Given the intractably political nature of such prosecutions, one's perspective on the question must ultimately turn on the degree (not whether) such interests—embodied here in the pathos of victim

317. *Id.* at 8–9; see also Susan Sontag, *Reflections on The Deputy*, in *THE STORM OVER THE DEPUTY* 117, 118–19 (Eric Bentley ed., 1964) (writing that "[t]he function of [*Eichmann*] was [] that of the tragic drama: above and beyond judgment and punishment . . . [T]he problem of the *Eichmann* trial was not its deficient legality, but the contradiction between its juridical form and its dramatic function"); cf. IAN BURMA, *THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND JAPAN* 142 (1994) ("When the court of law is used for history lessons, then the risk of show trials cannot be far off.").

318. FRIEDRICH NIETZSCHE, *THE USE AND ABUSE OF HISTORY* 13 (Adrian Collins trans., Bobbs-Merrill Co. 2d ed. 1957) (1874).

319. Felman, *supra* note 310, at 498 (emphases omitted); see also DOUGLAS, *supra* note 296, at 94 (not until *Eichmann* would victims "be permitted to be heard in court as fully embodied").

320. Cf. FROM NUREMBERG TO THE HAGUE: *THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 28 (Phillipe Sands ed., 2003) (noting that "[t]he precise nature of the crimes associated with the war had to be defined and given clear legal status" and that the Nuremberg trials helped "build[] the foundation for contemporary international law on war crimes").

321. Felman, *supra* note 310, at 504.

322. *Id.* at 504 n.66 (emphasis omitted); see also *id.* ("In the act of claiming their humanity, their history, their story, and their voice before the law and the world, they are actively (and sovereignly) reborn from a kind of social death into a new life.").

323. Shoshana Felman, *A Ghost in the House of Justice: Death and the Language of the Law*, 13 *YALE J.L. & HUMAN.* 241, 249 (2001).

324. See *id.* at 277. A similar victim-centeredness dominated the 1997–1998 trial of Maurice Papon by the French government for World War II-era atrocities in Vichy France. See Nancy Wood, *The Papon Trial in an "Era of Testimony,"* in *THE PAPON AFFAIR: MEMORY AND JUSTICE ON TRIAL* 96, 96–105 (Richard J. Golsan ed., 2000).

narrative—should infuse the legal process.³²⁵

In the United States, *Payne* signaled a resolute backing of this infusion, positing that harm, embodied in the personal traits of decedents and the losses stemming from their murder, is key to assessing offense gravity and defendant culpability, and that the “moral force” of such evidence is such that direct testimony should be permitted.³²⁶ Victim harm and the pathos it inevitably entails and engenders, to this way of thinking, are not irrelevant and extraneous to law and history-making; rather, they are central and critically important.

This view, however problematic in conventional murder trials, is complicated in the context of mass killings. As discussed, their fundamentally different character at once exacerbates acknowledged difficulties of VIE³²⁷ and calls into question the fundamental place of VIE in such prosecutions.³²⁸ But adoption by the international justice community of VIE, a recent (and controversial) innovation of United States domestic criminal law, is problematic on a number of other levels as well.³²⁹

Most fundamentally, serious question exists over whether the values embodied in VIE jibe with all or even a significant part of the international justice community.³³⁰ While the views of nations and cultures can coalesce on matters of broad importance (for example, the principle of *nulla poena sine* or the moral wrongfulness of murder), they often diverge on questions relating to more specific normative notions of substantive and procedural fairness.³³¹ Consistent with this awareness, increasing expressivist concern is today being voiced over the perception (and possibly the actuality) of unfairness of international criminal tribunals,³³² lending support to Robert Jackson’s prescient observation that

325. As Robert Cover famously noted, the legal tradition encompasses “not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it.” ROBERT COVER, *Nomos and Narrative*, in NARRATIVE, VIOLENCE, AND THE LAW 95, 101 (Martha Minow et al. eds., 1992).

326. See *Payne v. Tennessee*, 501 U.S. 808, 826–27 (1991).

327. See *supra* notes 160–216 and accompanying text.

328. See *supra* notes 217–37 and accompanying text.

329. See Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT’L L.J. 237, 251 (1998) (commenting that the “mechanical transfer of domestic criminal law principles to the international context . . . is fraught with dangers”); Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT’L L. 561, 565–66 (2002).

330. Needless to say, constituent parts of the world community do not necessarily share a normative preference for victim-centeredness, embracing instead the traditional norm that killings should be punished to vindicate broader societal and communal, not individual, interests. On the varied penological sentiments among various world subpopulations more generally, see DRUMBL, *supra* note 230, at 42–43, 135, 148; Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 92–94 (2002).

331. For discussion of the pervasive influence of the West vis-à-vis international justice norms and practices, often at odds with local norms and preferences, see generally RAMA MANI, *BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR* 47–49 (2002) (arguing that the greatest hurdle to transnational justice is the “predominance of Western-generated theories and the absence of non-Western philosophical discourse”).

332. See, e.g., Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT’L CRIM. L. REV. 93, 132–33 (2002) (asserting that “[o]veremphasis on conveying condemnation will transform

"[c]ourts try cases, but cases also try courts."³³³

Accordingly, to the extent that the international justice community seeks to win the hearts and minds of individuals prone to conceive of VIE as degrading the legitimacy of the legal process—in Moussaoui's words, creating a maudlin "Hollywood Deadly Circus"³³⁴—its task is made considerably more difficult with its admission. Such concern surely warrants attention on the figurative international stage as the tribunals struggle to achieve and maintain respect. Almost as important, however, is how VIE might play in the domestic realm, where internecine ethnic and political disputes in conflict-ravaged countries so often still simmer. With its highly personalized quality, VIE risks fueling perceptions of bias and uneven enforcement that continue to dominate local regard for international prosecutions, serving to exacerbate already substantial obstacles to heal societies plagued by mass killings.³³⁵

Sensitivity to social meaning, however, is not warranted solely vis-à-vis law-abiding members of the world community. As Diane Amann has observed, "[s]oberly recording events . . . may affect the understandings and actions of all in society, law-abiders as well as lawbreakers."³³⁶ Extended, highly emotional accounts from victims risk violating the important teachings of procedural justice, elucidated by the work of Tom Tyler and others.³³⁷ Even if one cares not what Zacarias Moussaoui, Timothy McVeigh, or Charles Taylor as individuals think about the fairness of their trials, it remains the case that other, future mass killers are watching, and perceived procedural impropriety risks aiding their lethal cause. Moreover, sensitivity to the expressive ramifications of mass killing prosecutions is especially warranted in light of the abiding concern that

what ought to be staid proceedings into theater in black robes The gravity of this concern for international criminal law institutions, still in the process of securing legitimacy, is obvious"). For discussion of the perceived procedural shortcomings of current international tribunals more generally, see Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111 (2002); Christian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381 (2001).

333. TAYLOR, *supra* note 240, at 45; see also Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 DUKE J. COMP. & INT'L L. 519, 526 & n.37 (1997) (quoting Richard Goldstone, Chief Prosecutor for the ICTY) ("Whether there are convictions or whether there are acquittals will not be the yardstick [of the ICTY]. The measure is going to be the fairness of the proceedings . . .").

334. See *supra* note 162 and accompanying text.

335. See, e.g., Sanja Kutnjak Ivković & John Hagen, *The Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived International (In)Justice*, 40 LAW & SOC'Y REV. 369, 369 (2006) (discussing the "suspicions of racial/ethnic and cultural biases in deliberations and decisions [and] prioritization of purposes in sentencing decisions" in the International Criminal Tribunal for the Former Yugoslavia and reporting results of surveys that "indicate that the citizens of Sarajevo increasingly believe[d] that the ICTY is politically influenced").

336. Amann, *supra* note 332, at 132.

337. See, e.g., E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (2002).

international tribunals lack meaningful deterrent effect.³³⁸

Pragmatic considerations also counsel against international adoption of VIE. The U.S. justice system, as noted above, shows obvious strains in its airing of VIE, with judges, lawyers, and jurors often proving ill-equipped to handle the emotionally fraught testimony.³³⁹ In *Eichmann*, this clash of legalism and pathos was famously highlighted when one of the government's chief witnesses, after being prodded by the court to answer questions in more concise, non-narrative form, fainted when testifying.³⁴⁰ Similarly, in the ICTY witnesses have struggled to provide information on the horrendous harms they suffered only to be reprimanded and cajoled by courts to provide "factual," abbreviated accounts bereft of emotion. For instance, in the trial of Radislav Krstic, where the prosecutor's strategy was to broaden the trial's focus beyond the actions of the defendant to the suffering of individual victims, witnesses were urged to simply state the names of decedents and other basic biographical information.³⁴¹ And when witnesses were permitted by the court to briefly speak more expansively of their hardships, at the conclusion of their testimony, their input was met with awkward responses that bordered on self-righteous patronization. After hearing from one witness, for instance, a presiding judge lectured:

Very well You have told us about your suffering. Thank you. You showed great courage in coming and testifying here. You have also given evidence of your spirit of tolerance. I believe I speak in the name of my colleagues when I tell you that we all wish you a happy return to your home. Yes, those places were witness to suffering, but they should also be witness to tolerance and peace. Injustice, wherever, shall always be a threat to everybody.³⁴²

Equally troubling was this exchange in the same trial:

[Witness:] I have lost a number of relatives and cousins and people who could have helped me, but today I have to help their children, and it's very difficult for me to help anyone. I am barely surviving.

[Court:] We are very happy that you have survived.

[Witness:] Yes, I was lucky. Yes, that's what I keep telling myself, but what's it worth now? My life has been damaged, my health

338. See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 49–50 (1998); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?* 84 WASH. U. L.R. 777, 831–33 (2006); see also THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 12 (2006) (acknowledging that "[t]he hard core of the terrorists cannot be deterred or reformed").

339. See, e.g., *supra* note 165 and accompanying text.

340. ARENDT, *supra* note 12, at 224.

341. Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT'L L. 151, 159–60 (2004).

342. *Id.* at 172.

[Court:] Well, I think that will pass with time. You're still a young man.³⁴³

Reflecting on these and other difficulties of victim-witnesses before the tribunals, two commentators recently offered that "[f]ar from giving the victims a hearing, they may leave them feeling silenced. Attempting to create a space for victims within the legal arena may be misguided."³⁴⁴

However, even presuming existence of the requisite skill on the part of questioners, concern remains over the anti-therapeutic nature of the courtroom experience itself. Just as there is reason to doubt whether VIE benefits U.S. witnesses,³⁴⁵ testifying in international trials can be problematic. As Eric Stover has observed:

Telling one's story can be intensely emotional, especially for those who have never told it publicly before. One can hardly expect victims and witnesses to come to a state of "psychological healing" after recounting a highly traumatic experience in a public setting that in and of itself may be threatening. . . . This is why . . . war crimes tribunals . . . should not be viewed as vehicles for individual psychological healing or moral pedagogy in the aftermath of genocide and ethnic cleansing.³⁴⁶

Likewise, the high-profile, frequently confrontational nature of mass killing trials, wherein defendants often lack contrition and any discernible trace of empathy, is ready-made to be hurtful. In the ICTY, for instance, witnesses testifying of their hardships have been rendered vulnerable to disdainful treat-

343. *Id.*; see also, e.g., *id.* at 175 n.97 (quoting ICTY judge's statement to victim: "We're very glad that you managed to survive those terrible events that you were able to testify to. We wish you a safe journey home and we hope that you will have a life that will give you reason to smile again.").

344. *Id.* at 175; see also ELIZABETH NEUFFER, *THE KEY TO MY NEIGHBOR'S HOUSE* 298 (2002) (noting disappointment among ICTY witnesses stemming from limits imposed on their capacity to expand on their sufferings).

345. See *supra* section III.A.3.

346. ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* 32 (2005); see also *id.* at 73 (concluding, on the basis of interviews with tribunal witnesses and available psychiatric studies, that "survivors of mass atrocity should be cautious about testifying in court"). Stover's interviews with ICTY witnesses revealed that only fourteen percent found it cathartic to testify of their war-time-based harms. *Id.* at 88; see generally Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT'L L.J. 295, 331-35 (2005) (providing overview of other work done to date reflecting similar outcomes). For discussion of anti-therapeutic consequences for witnesses in France's trial of Maurice Papon, see Wood, *supra* note 324, at 103-05. For surviving victims of sexual assault, in particular, the highly public narration of their victimization, amid the pressures and constraints imposed by the trial rubric, can foster especially acute re-traumatization. See Katherine M. Franke, *Gendered Subjects of Transitional Justice*, 15 COLUM. J. GENDER & L. 813, 816-23 (2006). On the tribunals' prosecution of sexual assault, a frequent tool of gender-based victimization and terror, see generally Andrea R. Phelps, Note, *Gender-Based War Crimes: Incidence and Effectiveness of International Criminal Prosecution*, 12 WM. & MARY J. WOMEN & L. 499 (2006).

ment by defendants,³⁴⁷ just as in the U.S. trials surveyed earlier.³⁴⁸

Victim marginalization can also assume broader more categorical form. Much as in the U.S. trials described earlier, transitional justice has evinced a tendency for essentializing victims and creating a hierarchy of worthy sufferers. In an effort to render a more effective narrative, Fionnuala Ni Aolain and Catherine Turner note:

This hierarchy elevates certain privileged victims, often those whose experiences parallel a particular political narrative of the conflict, or whose individual circumstances have strong symbolic resonance for larger national or ethno-political narratives. Left out by such maneuverings are those whose victimhood might be complex or compromised and whose story may serve to complicate the narrative rather than giving it the linear coherence that broader political objectives may demand.³⁴⁹

In a related sense, concern should also exist over the possible deployment of VIE to achieve broader didactic ends of government. The Nuremberg tribunals self-consciously eschewed such deployment. Eichmann's prosecution, on the other hand, was regarded by the fledgling government of Israel as a prime opportunity to convey its origin story and inspire a sense of collective identity.³⁵⁰ In the United States, as well, victim-centeredness afforded the government substantial political benefit, especially in the wake of 9/11.³⁵¹ Similar benefit can extend in the international context, as governments might seek to distract attention from their not having intervened earlier to stem mass killings,³⁵² again regardless of whatever negative effects the tribunals might have on victim-witnesses. In sum, if valid concern exists over the government making undue strategic use of victims in conventional capital trials,³⁵³ such government deployment should raise as much, if not greater, concern when nations jockey for positive status on the international stage.

Finally, much as in the United States, VIE would likely be of little practical

347. See, e.g., NEUFFER, *supra* note 344, at 301 (describing dismissive and disparaging behaviors of ICTY defendants); cf. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgment, ¶ 17 (May 27, 1999) (noting that in his trial before the International Criminal Tribunal for Rwanda the defendant Ruzindana "smiled or laughed" as victims testified).

348. See *supra* notes 192–94 and accompanying text.

349. Fionnuala Ni Aolain & Catherine Turner, *Gender, Truth & Transition*, 16 UCLA WOMEN'S L.J. 229, 265 (2007) (footnote omitted).

350. SEGEV, *supra* note 302, at 336 (the trial "sought to design a national saga that would echo through the generations"); *id.* at 328 (arguing that "[s]omething was required to unite Israeli society—some collective experience, one that would be gripping, purifying, patriotic . . . a national catharsis").

351. See *supra* section IV.A.

352. See Payam Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 745 (1998) (expressing concern that tribunals might function to excuse prompt action in the face of atrocities and thus might serve as nothing more than "cynical theater").

353. See generally MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USES AND ABUSES OF VICTIMS' RIGHTS* (2002).

legal effect. In the ICTR, for instance, where “gravity of the offense” serves as the “litmus test for the appropriate sentence,”³⁵⁴ gravity seemingly functions only to render the acts in question eligible for tribunal action. As Robert Sloane has recently written, “[e]very act of genocide and virtually every act prosecuted under the rubric of crimes against humanity (extermination, rape, murder, torture) is extremely grave.”³⁵⁵ Sentences, rather, turn mainly on the alternate consideration of “individual circumstances of the convicted person.”³⁵⁶ As a result, as in *Eichmann*, where Hannah Arendt observed the facts establishing his culpability “had been established ‘beyond reasonable doubt’ long before the trial started,”³⁵⁷ and in the U.S. trials surveyed earlier,³⁵⁸ such evidence lacked manifest legal purpose in the face of the enormity of the harm perpetrated.

The foregoing discussion has sought to highlight the difficulties presented by possible use of VIE in international mass killing prosecutions. Analysis of the competing legal paradigms of Nuremberg and *Eichmann*, in particular, however, should not be taken as so exclusive as to admit of no compromise.³⁵⁹ Indeed, evidence relating to victims’ personal traits, harm (to the direct victim, certainly), the number of persons a defendant has killed, and any particular cruelty shown bear obvious importance in both criminal culpability and punishment assessments.³⁶⁰ Moreover, the discussion here in no way should be taken as being critical of recent international efforts to ensure the well-being and participation of victim-witnesses more generally.³⁶¹ U.S.-style VIE, however, differs

354. Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Appeals Chamber Judgment, ¶ 413 (June 1, 2001) (internal citations omitted).

355. Sloane, *supra* note 287, at 722.

356. *Id.* at 723. In addition, considerations of “gravity,” Sloane notes, tend to be conflated with, and duplicate, other sentencing considerations, *id.* at 722–24, much as VIE has confounded related death penalty criteria in U.S. courts. *See, e.g.,* United States v. Bin Laden, 126 F. Supp. 2d 290, 299–300 (S.D.N.Y. 2001) (deeming non-statutory aggravating factor “serious injury to surviving victims” to be subsumed by VIE because “[b]oth function to provide the jury with details concerning the widespread human trauma allegedly caused by the accused’s criminal conduct”).

357. ARENDT, *supra* note 12, at 56.

358. *See supra* Part II.

359. Aside from their historical significance, Nuremberg and *Eichmann* uniquely benefited from an unprecedented wealth of documentary evidence left behind by the Third Reich. *See* Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL’Y 87, 107 (2001). This documentation played a central role in the Nuremberg trials. *See id.* The Israeli government in its prosecution of *Eichmann* similarly benefited from the Nazi’s paper trail but elected to make its case mainly by means of witness testimony. Contemporary atrocities typically lack such extensive documentary support, necessitating that victim-witnesses play a greater role in prosecutions. *See id.* However, the need for this greater involvement does not compel the admission of VIE-type testimony from the witnesses.

360. *Cf.* M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 327–28 (2003). Likewise, in the United States, such considerations figure in the capital decisionmaking process, independent of VIE. *See* 18 U.S.C.A. §§ 3591–3593 (West 2000 & Supp. 2007).

361. On the benefits of enhanced victim participation in the criminal justice process, including provision of notice and opportunity for input, *see* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 952–55 (2006) (identifying benefits of increased crime victim involvement).

in kind and degree from such facets of international criminal justice, leaving unresolved the evidentiary role that victims should properly play in mass killing prosecutions.

As noted, the time is ripe for this inquiry, as international justice protocols continue to evolve. One aspect of this evolution is the current interest in bifurcation of the guilt and punishment phases of mass killing prosecutions. While the ad hoc international criminal tribunals currently eschew bifurcation,³⁶² the Rome Statute governing the ICC presumptively establishes use of a distinct sentencing phase,³⁶³ envisioning consideration of aggravating and mitigating factors, including in the former category the "extent of the damage caused, in particular the harm caused to the victims and their families."³⁶⁴ To commentators, bifurcation promises numerous benefits, including a fairer, more orderly process in which defendants can avoid the dilemma of being forced to reveal mitigating sentencing information at the possible risk of incriminating themselves with respect to guilt.³⁶⁵ Bifurcation can also lessen the threat that inflammatory evidence relevant to sentencing will taint guilt or innocence determinations.³⁶⁶ It will also, as one commentator has urged, possibly facilitate development of a "mature jurisprudence" of sentencing, "one of the most significant international values" the tribunals "can realistically serve."³⁶⁷

In pursuing this approach, however, the international community should be mindful of the U.S. experience, where thirty years ago similar concern over lawless capital trials prompted bifurcation of the guilt and punishment phases.³⁶⁸ While laudable for its intent to remedy the systemic arbitrariness of the pre-*Furman* era, the regime has nonetheless proved a manifest failure in numerous critical respects.³⁶⁹ In its effort to at once increase the amount of information

362. See Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 92 (1999) (noting that the ICTY amended its rules to require determination of guilt and sentencing at the same time). Early on, the ICTY experimented with separate sentencing hearings but abandoned them due to "expedience and cost" concerns. See Sloane, *supra* note 287, at 734. Nuremberg trials, similarly, did not bifurcate. See William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, 461 (1997).

363. See GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS: A COMPARATIVE STUDY 117 (2003).

364. See I.C.C. R.P. & EVID. 145(1)(C).

365. See RALPH HENHAM, PUNISHMENT AND PROCESS IN INTERNATIONAL CRIMINAL TRIALS 61–62 (2005); KNOOPS, *supra* note 363, at 117.

366. See Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 93 (2007).

367. Sloane, *supra* note 287, at 734.

368. On this evolution, commencing with *Furman v. Georgia*, 408 U.S. 238 (1972), which invalidated all U.S. capital regimes in existence, through *Gregg v. Georgia*, 428 U.S. 153 (1976), which inspired the bifurcated approach now operative throughout the United States, see generally AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION (James R. Acker et al. eds., 1998); James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1 (2007).

369. For discussion of the failed hope of *Furman*, see Logan, *supra* note 197, at 1341–45.

provided to the sentencing authority (as evidenced in *Payne*), yet maintain a semblance of reasoned deliberation based on guided discretion, U.S. law has erred in favor of the former. The result has been a "state of acute system overload . . . symboliz[ing] a system that has thrown up its hands in frustration with its inability to accommodate all relevant interests within a framework of meaningful rules."³⁷⁰ Emblematic of this concern, a handful of U.S. federal courts have of late endorsed use of double-bifurcation, or "trifurcation," allowing introduction of VIE only after the jury finds the requisite threshold *mens rea* and statutory aggravating factors.³⁷¹

The overload, while troublesome enough with conventional capital trials, becomes significantly more problematic in the context of mass killings, where unconstrained use of VIE has overwhelmed U.S. sentencing phase proceedings. Again, the concern is not that this domination is problematic because it preordains imposition of the harshest sanction available under law. Indeed, the U.S. record directly refutes any such inference. Rather, concern lies in the capacity of VIE to inundate prosecutions and infuse them with a pathos and individualization that subverts the prosecution process and undermines its legitimacy.

In light of this, a preferable path for allowing victims' voices to be heard lies in an undertaking independent of the criminal process, based on experience thus far with truth and reconciliation commissions.³⁷² With mass killings, of course, reconciliation is often neither desired nor appropriate as an exclusive response.³⁷³ Rather, criminal accountability and public decisions on appropriate punishment, as in each of the U.S. capital trials surveyed earlier, are in order. Still, a commission-like forum would serve a very valuable complementary role in tandem with prosecutions.³⁷⁴ The undertaking would allow for public augmentation of the historical record, a goal known to be of critical importance to

370. Markus Dirk Dubber, *Regulating the Tender Heart When the Axe Is Ready To Strike*, 41 BUFF. L. REV. 85, 155 (1993). According to Professor Dubber, "[t]he current disarray in capital jurisprudence accurately reflects the uneasy compromise that must plague any system designed to accommodate our compassion for the victims of capital crimes while preserving the dignity of those whose lives it puts at stake." *Id.*

371. See Logan, *supra* note 57, at 6, 10 n.31 (citing decisions).

372. See MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS 71–72 (2006) (distinguishing procedures in truth commissions and criminal courts and noting that the former allow for greater victim-centeredness); *id.* at 223 (asserting that the "privileged public platform for victims" of a truth commission allows for heightened public understanding of victim harm). On the relative utility of prosecution and truth commissions more generally, see, for example, PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 135–40, 207–12 (2001).

373. See generally Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); cf. Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH v. JUSTICE 68, 72 (Robert I. Rotberg & Dennis Thompson eds., 2000) (asserting that truth commissions do "a disservice to survivors who regard themselves not as patients in need of healing but as citizens entitled to justice").

374. As Robert Sloane recently observed, "[e]ven if international law now creates a duty to prosecute under some circumstances, it surely does not prohibit complementary mechanisms for confronting the daunting political, social, and legal issues" attending atrocities. Sloane, *supra* note 366, at 46 (footnotes omitted). Priscilla Hayner likewise notes:

victims,³⁷⁵ in an environment hopefully more conducive to their recovery, while permitting the formal criminal process to remain free of the difficulties noted above.

A critical challenge, of course, would lie in obtaining adequate operational funds. It would indeed be appropriate if funding were to be obtained from the transgressors themselves. As it happens, ICC provisions now allow courts to impose (in addition to sentences of imprisonment) fines that are to be placed in an ICC Trust Fund for victims.³⁷⁶ Ideally, these resources could be augmented by contributions from ICC signatories and other parties, as permitted by the ICC.³⁷⁷ As important as providing financial support, the international community must be prepared to regard the mission of such a forum as a first-order priority. For if the world is serious about securing justice for those accused of mass killings, it must be just as serious about ensuring the public chronicling of the horrendous harms for which they are responsible and the healing, to the extent possible, of those individuals who have endured them.

CONCLUSION

"To respond to mass atrocity with legal prosecutions," Professor Martha Minow once observed, "is to embrace the rule of law."³⁷⁸ While lending support to this verity, this Article also confirms that, with the victims' rights movement ascendant, the rule of law itself admits of different meanings. In the United States, victim impact evidence has rendered conventional capital trials decidedly victim-centered, and despite the political controversy attending this shift,³⁷⁹ the same quality now infuses mass killing capital trials. As discussed, this

Nonjudicial truth bodies do not and should not be seen to replace judicial action against perpetrators, and neither victims nor societies at large have understood them to do so in those countries where truth commissions have been put in place. While their subject matters may overlap . . . trials and commissions serve different purposes, and neither can fill the role of the other.

HAYNER, *supra* note 372, at 87. Consistent with this view, the Sierra Leone Special Court commissioned a reconciliation commission to operate parallel to legal proceedings. See Franke, *supra* note 346, at 825–26.

375. See VICTIMS OF WAR: AN EMPIRICAL STUDY ON WAR-VICTIMIZATION AND VICTIMS' ATTITUDES TOWARDS ADDRESSING ATROCITIES 123 (Ernesto Kiza et al. eds, 2006) (noting that sixty-six percent of victims surveyed cited the creation of a historical record as the main purpose of holding offenders to account); Anne Orford, *Commissioning the Truth*, 15 COLUM. J. GENDER & L. 851, 855–59 (2006) (surveying literature supporting the significance to individuals and societies of public airing of abuses).

376. See generally Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, INT'L CRIM. L. REV. 345, 363 (2003).

377. See generally Regulations of the Trust Fund for Victims, ICC-ASP/4/RES.3 (Dec. 3, 2005).

378. MINOW, *supra* note 338, at 25.

379. Compare *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (asserting that barring victim impact evidence "conflicts with a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement"), with *id.* at 859 (Stevens, J., dissenting) (stating that the *Payne* "majority has obviously been moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion").

migration has not been seamless, with the admission of VIE exacerbating difficulties common to conventional capital trials and creating new ones. Moreover, principled questions exist over the role of VIE itself in such trials, in light of their unique nature.

Nevertheless, given its potent allure, strong reason exists to believe that VIE will continue to dominate future mass killing prosecutions in U.S. civilian courts, and should they come to pass, the prosecutions of alien unlawful enemy combatants,³⁸⁰ by military commissions (the rules of which already contemplate some use of VIE).³⁸¹ In addition, for reasons discussed, in coming years the international community will very likely be obliged to address whether VIE has a proper place. In contemplating this migration, however, authorities should remain mindful of recent U.S. experience with VIE in mass killing prosecutions, as well as how VIE affects the world's perception of the way in which mass killers are held accountable for their acts of depravity.

380. Such individuals would include Khalid Shaikh Mohammed, the alleged mastermind of the September 11, 2001 attacks, now in U.S. custody. See Neil A. Lewis, *Officials See Qaeda Trials Using New Law in 2007*, N.Y. TIMES, Nov. 3, 2006, at A5.

381. See THE MANUAL FOR MILITARY COMMISSIONS: RULES FOR MILITARY COMMISSIONS R. 1001(b)(2), 1004(b)(2) (2007), available at http://www.loc.gov/rtr/frd/Military_Law/pdf/manual-mil-commissions.pdf. Time will tell whether the commissions will become a preferred venue for such cases. Since 9/11, debate has of course raged over whether terror suspects should be prosecuted in civilian or military courts or some other form of hybrid tribunal such as the commissions. See generally Diane Marie Amann, *Punish or Surveil*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 873 (2007). Ongoing controversy over the commissions, as well as the successful recent prosecution of Jose Padilla in federal civilian court, after many years of governmental trepidation over jurisdiction, makes resort to the civilian criminal justice system all the more likely. See Adam Liptak, *A New Model of Terror Trial*, N.Y. TIMES, Aug. 18, 2007, at A0.